LAW BOOKS AND HOW TO USE THEM

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PREFACE.

The purpose of this book is given in the Introduction. I can only reiterate my hope that it may prove useful by giving information, which, though it seems very simple when put into print, is still of such nature, that want of it is a serious handicap in the study and practice of the Law.

J. C. TOWNES.

AUSTIN, TEXAS, December 1, 1909.

INTRODUCTION.

It has passed into a proverb that "It is not so difficult to know the law as it is to know where to find it." This, like all other sayings of the wise, has in it a large percentage of truth. The law is all in the books, but who among us knows just where to put his hand upon it? Who can go into a library, walk directly to the book or books which deal with a particular question, and say at once, "Here is the rule which settles this point"? Yet the particular rule which governs must be found and applied to every point arising in every case on which the lawyer is to prepare an opinion, or in which he is to take part in the litigation. The facility with which a particular lawyer can do this is one of the tests of his efficiency and success.

Few among the young men who enter our Law schools can at the time of matriculation enumerate the different kinds of law books, and fewer still know how to use them to advantage.

How is this condition, of ignorance and consequent inefficiency, to be removed? How can these young men most readily be given a key, not to the door of the library room only, but to the library itself. It would take but scant time and trouble to escort them

into the study room, but they would be but little wiser after than before their arrival. It is a somewhat more difficult task to take them to the several shelves and acquaint them with the different titles of the books there awaiting them, but this is of no consequence unless the process goes further and gives them mastery over the store-house of information and teaches them how to extract from those books the living and dominating rules of Law that rest between their bindings. How is this to be done? In most Law schools the student is left to his own devices to learn the different kinds and uses of Law books, as best he may by his own effort and study of them. If only one method is to be employed, this surely is the one to select, for here as elsewhere "Experience is the best teacher." But it is also true that experience exacts the highest tuition, and is the most expensive instructor any one can employ.

Is it not well, therefore, that while the student still takes lessons by daily use of the different kinds of books, that this be supplemented by some direct effort on part of the faculties to aid the slower process and bring him more speedily in touch with the library? To aid in this I am preparing this brief text on the subject of Law Books and How to Use Them.

The general purpose of the book is first to enumerate the different classes of law books; second, to take

up each class separately, consider it carefully, ascertain for what each class stands in the Literature of the Law, and third, to study each class so closely that we will have just and accurate ideas of its legal purpose and value, and will become so familiar with the general characteristics and plans that we can readily find in any book belonging to that class any and everything that it may contain.

Our main purpose in this course is to answer the question, "How to find the Law?" Yet incidental to that we will be compelled to give some attention to interpreting, valuing and applying that which we find.

LAW BOOKS AND HOW TO USE THEM.

CHAPTER ONE.

EVIDENCES OF THE LAW.

Necessity for Proof of the Law.

At the threshhold of our inquiry as to How to find the Law? lies the other inquiry, How is the Law proved? There is a great deal of insistence in law books as to the necessity of keeping the distinctions between law and fact clearly in mind. We are told time and again that the law is presumed to be known by the courts and need neither be plead nor proved in order to be invoked, while facts, with few exceptions, are not known to the court and can not be taken into account in deciding a case unless they are both plead and proved. These are both correct statements and represent real and very important rules of practice which should not be lost sight of. Still neither of them must be pressed too far, for there are always matters of fact involved in every inquiry as to the law. Before a court can possibly enforce any rule of conduct it must know that the rule ex-

ists, and what it is, and that it has come from proper authority. Each of these inquiries involves questions of fact which can only be settled by resort to evidence.

For example, a court is in session, engaged in the trial of a case involving a certain question of Law which has not previously been decided in that State. The Supreme Court of the State is also in session and has the same question pending before it. The Judge of the lower court hears that the Supreme Court has decided the case before it, but gets no information as to how the particular question was settled. In legal theory he knows the law and just what the Supreme Court has held, but in point of fact he does not. He knows there is an authoritative rule, but he does not know what the rule is. How is he to ascertain this? He gets into communication with the Supreme Court and obtains a copy of its opinion. From this opinion he ascertains the law. In other words, the opinion of the Court is the evidence which proves to him not only the existence but also the nature and effect of the rule of law. The same thing is true as to subsequent judges trying similar cases. They look to this opinion to find out just what the law on that point is. In other words, that opinion of the Supreme Court is evidence of the law on that question in that State.

The same is true of legislative action. A Legisla-

ture is in session. A proposed law is pending before it. One paper publishes that the bill has passed to go into effect at once. Another paper denies this and declares the bill failed on its final reading. A judge in a remote part of the State is trying a case which involves the matter covered by the bill. If the bill has passed and is law, the judge must decide the case one way, if it has not passed, he should decide it the other way. How can he proceed until he gets reliable information as to what the Legislature really did in the premises. The means by which this information comes to him is evidence of the law. If it is a fact that the bill passed, the law is one way, if it is not a fact, the law is the other.

These simple illustrations will assist us to understand what we mean by Evidences of the Law. Both the examples just given deal with changes in the law. This was done to make the point clear and easy of apprehension. But the same thing is true of all law. For example, a question arises as to the rights of a person claiming under a purported deed to land executed many years previously. According to the statutes in force at the time of the trial, the instrument is not properly executed. The adverse party makes this point before the court. The claimant replies that it is true under the present statute that the instrument would not be good, but at the time the

instrument was made the statute was different. The judge does not know what the old statute was. He can not decide the point intelligently, but the claimant procures a properly authenticated copy of the old statute and shows it to the court. He thus proves both the fact of the old law and what it was, and the court decides in his favor. So of all law. If it is known to the particular judge trying a case it is because he has formerly examined the evidence proving it. If it is not known, the evidence, in some form, must be adduced.

Law Books as Evidence of the Law.

In the great majority of instances law books of different kinds are the means or instruments by which the law is proved or made known to the courts.

The questions at once arise, Are all law books equally valuable as evidences of the law, or are some entitled to greater credit than others? And if the latter, how are these differences in value to be ascertained and tested?

For reasons which will appear as our study proceeds, there are great differences in the probative weight or value of different kinds of law books, also in the weight or value of different books of the same kind, and not infrequently in the weight and value of

the same book at different places and under different circumstances.

To ascertain the tests by which these differences are to be determined is the principal purpose of the study of this course. This capacity in law books to evidence the law is called Authority, and the differences in their value as evidence of the law are frequently expressed by the use of the terms, imperative and persuasive.

Any book which tends to prove what the law is, is called an authority.

An imperative authority is such a declaration of the rule under investigation as compels the judge to enforce the rule announced, leaving him no room for exercise of judgment.

A persuasive authority is one which is reasonably calculated to induce belief of the existence of the rule as stated, but which does not absolutely and positively establish this fact.

The difference between these two kinds of authority is very important.

Classification of Law Books.

The most general classification of law books is into Books of Written Law, on the one hand, and Books of the Unwritten Law, on the other. The use of the words "written" and "unwritten" in this connec-

tion has been frequently criticised, and the words "enacted" and "unenacted" have been suggested as substitutes. Possibly the latter terms are somewhat more exact, but the difference in their favor is not great and usage has sanctioned the other mode of expression for so long that it would be both useless and ineffectual to attempt to change it.

The written law does not mean all law which has ultimately been put into writing or print. To give it this interpretation would make it include practically all unwritten law as well. For much of this is printed. The meaning of the word "written" in this connection is much narrower and includes only expressions of sovereign will which were written in exact terms and promulgated in that particular form *before they became law.*

These include all Constitutions, statutes, treaties and ordinances.

The unwritten law includes all those expressions of sovereign will which grow up in the habits, customs and lives of the people and which have been announced by the courts as rules governing the rights of parties on those points on which there is no written law, as that term has just been explained.

As to whether the unwritten law is really law and, if so, by whom and how and when it is made law, there are controversies coming down through the

centuries. "And the end is not yet," for no one has arisen wise enough to give authoritative answer to the many and interesting questions involved. Pending the controversies, the courts move calmly on, recognizing and enforcing these rules, thus compelling the world to acknowledge that practically these rules are either genuine laws or else are counterfeits so skillfully substituted that no man can point out the difference. So we do well to call them laws. The other classifications of law books which we shall hereafter present will be but subdivisions of these two great classes and need not be further mentioned here.

CHAPTER TWO.

BOOKS OF THE WRITTEN LAW.

What Included In.

Books of the written law are those in which are published the rules of conduct which have been formulated and expressed in written terms and have been enacted into law in these terms, by exercise of the legislative power of sovereignty. They are the books which contain the express declarations of sovereign will, which declarations, in almost all instances, are limited in their application to transactions taking place after such formal expression.

They embrace the books containing Constitutions, statutes, treaties and ordinances. As these are all express declarations of the will of sovereignty in written terms, they are of very great importance and no library can be regarded as complete without them or such of them as are in force in the jurisdiction in which the library is situated. Nor is any man equipped to practice law until he knows in what books he can find these written laws which are in force in his community and also how to find the contents of such books and the rules of construction and interpretation which govern in ascertaining their meaning.

Here, as elsewhere, the American lawyer is confronted with the peculiar nature of our dual institutions and governments and the intimate business and social relations among the peoples of the several States. He must familiarize himself with the fact, that in whatever State he may reside, there are two Constitutions and two sets of statutory laws with which he must come in daily contact and with which he must be familiar, and the relations and authority of which he must understand. If his practice is extensive, he is inevitably brought into contact with new sets of written laws contained in the Constitutions and statutes of other States, which laws either have entered into the rights or liabilities of his clients within his own State or are involved in cases in other States into which he may be called to practice. No man, now preparing himself for practice of the law in any part of the United States, who expects to make a real success of his profession, can regard himself as properly equipped for the bar until he at least realizes the necessity of knowing much beyond his local law. I include in the terms local law here the laws of the United States, as well as his own State. These he must know, but thorough equipment does not end here. He should at least know the kinds of books in use in other jurisdictions and the most effective way of using them.

Constitutions.

Mr. Bouvier defines a Constitution as "The fundamental law of a State, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise." This is broad enough to include both written and unwritten Constitutions, and to that extent makes it desirable to explain our classification of Constitutions as written laws. The explanation is found in the fact that we are dealing exclusively with American law books and in America, Constitutions are always written or, to speak a little more accurately, enacted. In Europe this is not true. Some European Constitutions are written, as in France, while others are unwritten, as in England. But for the purposes of classifying American law books, Constitutions fall within the written law. The American idea of a Constitution is a written instrument setting forth the plan or scheme of government established and to be maintained by the people ordaining it, and containing a few additional provisions, usually asserting important political principles or reserving fundamental individual rights. As American Constitutions are usually adopted by vote of the people themselves, they are regarded as direct exercise of Legislative power by sovereignty.

Constitution of the United States.

Each of the thirteen original States had been a British colony, having a charter in some form emanating from the British Government. On July 4, 1776, these colonies declared themselves to be "Free and Independent States." They were then waging the Revolutionary War with the mother country. In 1778 these States, by a written agreement, entered into a Confederation for certain purposes set out in the articles of agreement, commonly called "The Articles of Confederation between the States." These articles were the bond of union between the several States entering into the Confederation. They can hardly be called a Constitution, for they did not organize any government having power sufficient to be recognized as such. The Articles are, however, very useful for many purposes, chiefly as showing the processes of political thought and growth which eventuated in our present Federal Constitution.

After the end of the Revolutionary War, it became apparent that the Confederation was not adequate for the purposes for which it was designed, and a number of the States signified a desire for a change in the basis of the Union. The Congress of the Confederation called a Convention of Delegates from the several States for the purpose of amending the Articles of Confederation. The Legislatures of several

States made similar calls. The States responded and sent delegates. These met and, after a long and most extraordinary session, proposed to the States, not a series of amendments to the Articles of Confederation, but an entirely new instrument, creating a real government, which instrument was to become operative upon the ratifying States so soon as it was ratified by any nine of them. It was eventually ratified by all thirteen States. It brought into being the present United States Government.

This Constitution is at once a grant and a limit of power. Every power conferred by it upon the United States Government, either expressly or by proper implication, pertains to that Government and may be rightfully exercised by it. No power not so conferred is possessed by that Governmnt, nor by any of its departments or officers.

The Constitution in terms declares that it and laws and treaties made in pursuance thereof, are the supreme law of the land. The only matters on which dispute may arise are what powers are thereby conferred and what laws and treaties are made in pursuance of it.

The Constitution sets out methods by which it may be amended, thus providing for peaceful revolution. Acting under these provisions, fifteen amendments, from time to time, have been declared to have been

adopted, and these have been incorporated into the Constitution and form constituent parts thereof. Most of these amendments embody new matter not contained in the original instrument, a few of them effect changes in original provisions.

Forms in Which the Constitution is Published.

The Constitution and its amendments are not the subject of copyright and hence they have been published in many forms and in great numbers.

As originally drawn, the Constitution consisted of a preamble and seven articles, each article being subdivided into sections and subsections. As most frequently published now, these are numbered.

In printing the Constitution, it is usual to follow the original instrument with the several amendments to it, each amendment being designated an article and being numbered from 1 to 15, respectively. These amendments are, however, usually cited, not as articles, but as amendments, appending the proper number. This is done to prevent confusion. To illustrate, if you desire to cite the "full faith and credit clause" of the original Constiution, you would write Art. IV, Sec. 1, whereas, if you wished to cite the amendment providing against unreasonable seizures you would write Amendment IV; though if you

examine almost any publication of the amendment, it will appear as Article IV.

A large number of annotated copies of the Federal Constitution have been printed. Some of these consist of the original document and amendments, with a citation of the cases under each section in which that section has been construed. Others have comments more or less extensive on the text and on the cases, with extracts from or digests of the cases cited.

There have been numerous commentaries on the Constitution written, many of them are very instructive.

As the Constitution is the supreme law, it is very important to properly understand it. Its meaning is ultimately determined by the Supreme Court of the United States, and it is in the reported decisions of that high tribunal that its real legal significance and effect may be found.

Any case, whether brought in a State or Federal court, which involves a construction of any part or clause of the Constitution may be carried to the Supreme Court of the United States for final decision of the constitutional question, provided any right or privilege claimed under the Constitution has been properly claimed by and denied to the claimant.

State Constitutions.

Each of the original States had a charter from the

British Government. When they declared their independence from England, this, of necessity, made radical differences in their forms of government. A good many of them, within a short time, made formal changes in their charters to conform to these changes in fact, and prepared and adopted State Constitutions. Others were very much slower in making the written Constitutions conform to the actual facts and retained for years their charters as their organic law. Rhode Island did not adopt a State Constitution until 1842.

Each State in the Union now has a written Constitution, setting forth the plan of its State government and providing for its operation and perpetuation, and practically all have a statement of rights reserved and withheld from the control of the Government.

These Constitutions are modelled after each other, the latter conforming in their general features to the earlier, with a marked tendency to go more into detail and include in the Constitution many things more properly within legislative control.

Most if not all of the Constitutions have a preamble, recognizing the existence of God and invoking His blessing on the government to be organized under the instrument. The three departments of government are recognized in them all and expressly declared in most. The lines of separation between these

departments are almost the same in all the instruments. The general scheme of government is the same in all.

These Constitutions are usually prepared by Conventions of Delegates duly elected by the people of the respective States for that purpose and the instrument thus drafted is submitted to the people of the State for adoption or rejection. It takes a majority vote of those participating in the election and voting on that question to adopt a Constitution. If the proposed Constitution is rejected, the old government continues unaffected by the proposed change. If the Constitution is adopted, it becomes the fundamental and organic law of the State, taking effect at the time provided in the instrument.

The Federal Government has no control over the people of the State in the formation or adoption of a Constitution, except that the Constitution provides in effect that each State must maintain a Republican form of government, and any effort by it to depart from this form would be subject to check by the United States.

In case of conflict between the Federal Constitution and a State Constitution, the latter must yield, for the former is the supreme law in all matters to which it relates.

Forms of Publishing State Constitutions.

The Constitutions of the several States, like that of the Federal Government, are printed in many forms. They appear almost always at the beginning of copies of the compiled statutes of each State. They are also printed in pamphlet form, some with and some without annotations. Not infrequently these annotations and comments are so extended as to swell the pamphlet into a volume of considerable size. In the best of these copies there are extensive indices and cross-references, so that the student has ready access to the contents of the instrument.

The courts of last resort in the several States are the final interpreters of the State Constitutions. If a State Constitution as construed by the court of last resort in the State is, in the judgment of the Supreme Court of the United States, contrary to the Constitution of the United States as construed by the latter court, it will declare the conflicting part of the State Constitution void and of no effect. If, in the judgment of the Supreme Court of the State, a provision of a State Constitution conflicts with the Constitution of the United States, the State court will declare that much of the State Constitution void.

If a State Constitution in any of its provisions is contrary to an Act of Congress or a Federal Treaty

made in pursuance to the Federal Constitution, that much of the State Constitution is void.

Statutes.

Statutes are not enacted by the direct vote of the people, as are Constitutions, but are brought into being by action of the people by their duly accredited agent—the Legislature. This is legislative action by delegated authority. A Constitution and a legally enacted statute is each brought into being by the legislative power of the people, but in the first the sovereign people act directly at the polls, while in the second they act through their duly appointed representatives, their chosen Legislators.

General and Special Law.

Statutes are of two general kinds, General, which are intended to apply to and control the conduct of all persons by general rules applicable to all alike; and Special or Private, which always relate directly to private or local matters not affecting the public generally. These are usually printed in separate books. General Laws are presumably known to all men and there is no need to plead them in any case, tried within the jurisdiction of the sovereign enacting the law. Special laws are not presumed to be generally known and those who seek benefit under

them must both plead and prove them in order to justify a court in taking notice of and enforcing their provisions.

Federal Statutes.

Federal Statutes are enacted by the Congress of the United States. Each session of Congress passes a number of laws, some repealing or amending old laws, and some prescribing new ones. All of these are recorded by the clerks or secretaries of the respective houses of Congress and are then filed with the Secretary of State and in due time are published. These are called the Session Acts of the respective Congresses. At irregular intervals, these Session Acts are brought together and revised and published in collective form. Some editions of these Revised Federal Statutes are copiously annotated, citing under each section of the statute all cases construing it and giving a brief statement of the effect of the decisions.

State Statutes.

The Statutes of the several States are passed by their respective Legislatures. In most of the States the Legislature meets biennially, in a few it meets every year, and in a smaller number only once in every four years. The Governor has the power to call the Legislature together in special session when the public

interests are thought by him to require this. In regular sessions the Legislature may legislate concerning any matter not forbidden to it, either by the Constitution of the State or of the United States. In special session, it can only legislate regarding matters submitted to it by the Governor by message. It is apparent from this statement that the aggregate of the statutes enacted by the Legislatures of all the States is very great. Fortunately, the acts of each State are confined, to a very large extent, in their legal effect, to the State in which the Legislature sits, so that the lawyer in ordinary practice need be specially familiar only with the Statutes of his own State. He, of course, will need to know the statutory law on particular points in some other State in connection with special cases or in matters within the scope of his practice. He, therefore, must know how to find and understand the Statutes of each State in the Union. This is relatively easy as all legislation in the several States is carried on in substantially the same way, and the books containing the Statutes are substantially of the same kind. If, therefore, he studies the Statute books of his own State and knows how to find what he needs in them and understands it when he finds it, he will be reasonably well equipped to investigate and understand the statutes of other States.

Statutory Books.

Each House at each session of each Legislature makes provision for preserving a record of all its proceedings and also keeps possession and control of all bills and measures of every kind pending before it. When a bill is finally passed, it is signed by the proper officer of each House and sent to the Governor. When he has approved it, or has let the time within which he may note his disapproval pass without action, the bill becomes a law and is filed permanently among the records or archives of the Secretary of State. After the adjournment of the Legislature, the Secretary of State collects all the laws and the resolutions of permanent nature and prints them by authority of the State in a volume known as "The Acts of the Regular Session of the Legislature," designating the Legislature by its appropriate number. If it is a called session, the style of the volume indicates that fact.

At each session of the Legislature there are passed a large number of both general and special laws or statutes, as explained above. These are usually printed in separate volumes, though not infrequently they are put forth in the same book. These books are known as the Acts of the Legislature or Session Laws.

Contents of Session Laws.

They consist usually (1) of a title page, showing the nature of the laws contained in the volume, that is, whether general or special; the State by which they are enacted; the session of the Legislature at which they were passed; the place and time at which the Legislature enacting them was convened; and the date of its adjournment; (2) of a table of contents, giving very briefly the matters to which the different laws relate and the page where same appear in the volume; (3) true and correct copies of the several laws themselves as enacted and appearing of record in the office of the Secretary of State.

Each of these Acts usually is preceded by a brief general statement of the matters dealt with in the Act. The identity of the bill is usually shown by abbreviations, thus, S. B. No. 2, which means Senate Bill number two, showing that this law was the second bill introduced in the Senate at the session of the Legislature at which it was enacted. Next follows the caption of the Act. This is the heading or title of the bill as passed. This is important, first to give a general idea of the body of the bill, and second to enable all persons interested to judge whether or not the Constitutional requirement, that the purpose of the bill shall be set out in its caption has been complied with. Next after this comes the enacting clause.

Then follows the body of the bill or law, consisting of one or more sections as the case may be. Then frequently follows a statement as to the number of votes cast for and against the bill in each of the two Houses on final passage and the record concludes with a statement of the action of the Governor on the bill and when it became a law. This completes the publication of the particular law being dealt with. The same process is gone through in regard to each law passed. These laws are usually arranged in the book in the order in which they are acted on by the Governor.

After all the laws are thus included in the book, the joint resolutions, if there be any, passed at that session of the Legislature are inserted.

Following these, or immediately after the laws, if there are no resolutions, comes the certificate of the Secretary of State as to the correctness and authenticity of the publication.

After this comes an index, giving more detailed information as to where to look to find the enactments on the various matters dealt with in the book. This completes the volume.

The Special Laws enacted are usually published separately, following the same order as with the general laws. Sometimes these are printed in the same volume as the general laws, in which case it is cus-

tomary to place all the general laws consecutively in the first of the volume and to follow these with the special laws.

Statutory Compilations.

In the course of time these Session Acts accumulate and become very voluminous, and cumbersome, so that it takes a great deal of time and patience to trace the statutory law on any particular subject, and when it at last is found, it is likely to be inconsistent in some respects and confusing. To obviate these difficulties, the several States provide for revision of these laws and the publication of all Statutes in one body or code. These books are called, usually, Revised Statutes or Codes and are further distinguished from one another by giving the year of their publication, as, for instance, "The Revised Statutes of Texas, 1895."

These revisions are made by direct authority of the States. The usual method is to appoint a commission to go over the whole body of statutory enactments and arrange and codify them, clearing away all obsolete and inconsistent provisions, and in addition making suggestions as to new matter that should be incorporated in such a Code.

The commission reports the result of its labors in the form of a proposed revision of the Statutes to

some subsequent session of the Legislature and this takes such action on the report as it sees fit. The proposed revision has no force or effect, save as a recommendation to the Legislature and a basis for intelligent work by that body. The Legislature may reject it entirely or adopt it in its entirety or in part or make such additions as it sees fit. It is the revision as made and enacted by the Legislature which is Law.

These revisions usually consist of two great divisions, the Civil Statutes or Code, and the Criminal Statutes or Code. The latter is usually divided into the Code of Criminal Law and of Criminal Procedure. Each of these Codes, that is, the Civil Statutes and the Code of Criminal Law and the Code of Criminal Procedure is divided into titles, each title treating of some general subdivision of the law. These titles are then divided into chapters and these into paragraphs, and these, very frequently, into sections.

The order of arrangement of these titles differs in different revisions. Usually the titles in the Civil Statutes are arranged alphabetically, with reference to the general topic treated; and the chapters in the title are arranged with reference to a proper subdivision of the subject-matter. The titles in the Criminal Codes and Codes of Criminal Procedure are usually arranged with reference to subject-matter and not alphabetically.

These revisions or codes are always indexed, sometimes with considerable accuracy and fullness, but frequently in a very unsatisfactory manner. Each of these codes when adopted is made a record in the Secretary of State's office, as in case of Session Acts, and the official copies are always authenticated by certificate from that officer.

Private Publications of Statutes.

Statutes are public records and are not covered by copyright. As it is to the interest of the public to have the knowledge of the law as general and widely distributed as possible, few restrictions have been placed around the publication of the Statutes, and editions of the statutes gotten out by private individuals are very common.

Statutory Reprints.

One kind of these publications is a simple reprint and binding together of the various session acts of the State, putting the acts of the several sessions in chronological order. These are relatively inexpensive reproductions as the price of material and printing are the main items of cost. The editorial work is very little.

These books are valuable, not so much as a basis of new rights that may arise, but as helps to determine

what legal rights existed and became vested during the period when the respective statutes were in force. Many rights, particularly those relating to real property and marital relations, when once vested under an existing law, may, and often do continue after the law has been repealed. For example, a statute of descent is in force. A person owning property dies, the property passes to his heirs according to the statute. The rights of the heirs in their respective shares of the property vest in them. These rights will continue unaffected by any subsequent change in the law. For example: If this inheritance took place in 1850, it might be impossible for a lawyer to pass intelligently on the rights of the parties or those holding under them under the present statute. He would be compelled to go back to the Statutes as they existed in 1850, when the descent was cast. So in many other questions. It is always, therefore, desirable for a lawyer to have access to all the past statutory enactments of his State in the form and in the order in which they were passed.

Annotated Statutes.

Another form in which private individuals publish Statutes is known as Annotated Statutes. These consist of all the current statutes, compiled and arranged in some systematic order, usually an alphabetical ar-

rangement by title, and placing under each article or section, or sometimes even after each subdivision of a section a note, citing all the cases construing and passing on that particular part of the statutes to which the note refers. Such annotation when properly done is of immense advantage in saving time and labor and insuring thoroughness. Statutes of this kind are almost indispensable to the busy lawyer. Usually the basis of these annotated statutes is the latest Revised Statutes of the State. If there have been sessions of the Legislature since the Revised Statutes were published, the statutes enacted in such sessions are included either by incorporating into the body of the book the respective enactments at the appropriate places, or by putting them at the end as an appendix.

If a long interval elapses between the issuance of Revised Statutes by the State, the acts of Legislatures held since the last Annotated Statutes were published are often put together in a supplemental volume, including the new statutes and bringing the notes down to the date of the Supplement.

Treaties.

Under our Constitutions, treaties with foreign nations can be made only by the Federal Government, and treaties between the States are forbidden. Strict-

ly speaking, treaties are not laws, but they are of binding force on all the citizens or subjects of the high contracting parties, and, hence, are rules of conduct for the nation and States and individuals. Recognizing this fact, the Constitution of the United States enumerates Treaties among those instruments which go to make up the Supreme Law of the Land. They do not affect private rights in many instances and are, hence, not often found in law libraries, and so need no special treatment.

Ordinances.

Under our system of government, it is competent for the Legislature of a State to authorize the proper officers of incorporated towns and cities to pass laws of local application and force, concerning the proper policing of the town or city, and the protection of its inhabitants. All serious offenses are still dealt with by State officers and authority, but matters of lesser consequence may be regulated by city ordinances. These ordinances, when passed in conformity to the authority given by the State, are valid and must be observed. As they are based on the authority of the State chartering the city, and are an exercise of the State's powers delegated to the city officers, they are law and as they are enacted in exact terms by the city

legislative body, they are written and hence come in the present class of Written Laws.

These ordinances are frequently published by the city and such books are included in the books of the Written Law.

CHAPTER THREE.

BOOKS OF THE UNWRITTEN LAW.

Enumeration.

There are various kinds of books which come under this general designation. The most important of them are:

Reports of Decisions of Governmental Tribunals.
Digests.
Various kinds of citations.
Dictionaries.
Text-Books.
Encyclopedias.

These we will consider in the above order, giving to each such treatment as seems most advantageous.

An enumeration of all the books included in these classes would be altogether impracticable, and will not be undertaken. However, as all are directly interested in the Reports of the Federal Courts, a reasonably complete enumeration of these will be made in an appendix, thus giving the student useful information as to those particular sets, and also illustrating a number of the different kinds of reports that exist. There are also a number of blank pages in the appendix on which the student, under the direction of

his instructor, can enter lists of the Constitutions, Statutes and Reports of his own State; in short, in which he may make such a legal bibliography as he may see fit.

Reports of Decisions of Authoritative Tribunals.

The first class of the books of the unwritten law may be designated reports of decisions of governmental tribunals. Most of these tribunals are judicial in their nature, though there are others, not strictly of this class, whose records may well be included in this class of books of the law, such, for instance, are the Reports of the Interstate Commerce Commission, or of the Commissioner of Patents.

Reports of legal tribunals are by far the most valuable of the books of the unwritten law. It may even be said that the principal and, in many instances, the only element of value in the other kinds of this class of books is that they are keys to and aid and facilitate the study of these Reports.

Court Reports.

We will first consider the Reports of Decisions of the various courts, confining the discussion practically to the courts of America, adverting to England and English Reports very briefly and only as an aid to the study of the American series, if at all.

The books of Reports are the published records of the opinions of the respective courts delivered in deciding cases, together with such other matters pertaining to the cases reported and their hearing as tend to make the opinions intelligible.

Court Decisions.

Under common law ideas and in the jurisprudence of common law countries, every decision by a court has two essentially different aspects. This is particularly so of courts of last resort, that is, courts whose decisions are final and not subject to be reviewed and revised or set aside by any other tribunal.

These two aspects are:

First, the decision as between the parties to the litigation. In this aspect the decision and judgment are a final and conclusive adjudication and adjustment of the respective rights and liabilities of the litigating parties and their privies in and concerning the matters at issue between them in the suit. In this aspect, the decision and judgment are limited in their effect to the parties before the court and their privies in estate and to the issues involved. By the judgment, these issues as between these parties are conclusively settled, and the matters litigated can not be again opened between them. This rule is usually spoken of as the doctrine of *res adjudicata.*

Second, the decision in its effect on others not parties to the suit. In this aspect the decision becomes a precedent for the guidance of the court rendering it, and of other courts in determining how similar and analagous cases shall be thereafter decided. In other words, each decision by a court presumably being rendered properly and in accordance with law is either imperative or more or less persuasive evidence of what the law really is. The rule requiring the following of precedents is usually known as the doctrine of *stare decisis*.

It must be noted that the rule of res adjudicata applies only between parties to the judgment and their privies, and as between them it is limited to the matters in issue in the particular suit, while the doctrine of *stare decisis* has no such limitations. The matter of parties is not considered at all in its application, nor is identity of subject matter required. Similarity in the leading features of the two cases to such extent as to show analogy is sufficient. With the doctrine of *res adjudicata* and its application we have nothing to do in this course. I mention it only to point out the differences between it and *stare decisis*, thus hoping to prevent confusion. On the other hand, the doctrine of *stare decisis* is directly within our topic, not that we are concerned with the policy of the doctrine, but because to a large extent upon that doc-

trine rest some of the most important rules determining the force and value of decisions as precedents, and it is with decisions as precedents that we are now dealing.

Doctrine of Stare Decisis.

Mr. Broome, in his Legal Maxims, 7th Edition, 147, speaking on the subject of *stare decisis*, says: "It is a general maxim, that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The rule as stated is to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one—*Jus dicere et non jus dare.*" This is, perhaps, as strong and broad a statement of the doctrine as can be found.

Later authorities have modified or at least limited the area of the application of the rule thus broadly announced. The above doctrine is still adhered to when the precedents announce rules of property or govern private business affairs, but if they relate to matters of public interest, or if the circumstances are such that it is apparent that vested rights and settled courses of business dealing will not be disturbed, the courts now claim and exercise the power and right to overrule their previous decisions. In Ellison vs. Georgia R. R. Co., 87 Ga., 696, in passing on the effects of precedent in deciding a constitutional question, Bleckley, C. J., says that the Supreme Court is "Supreme in the majesty of duty as well as in the majesty of power," and in deciding constitutional questions its maxim "is not *stare decisis*, but *fiat justitia ruat coelum*," *i. e.*, the rule in such cases is not that prior decisions must stand, but that justice must be done though the heavens fall. Even with the modern limitations, the doctrine is far-reaching and of very great practical effect, leading not infrequently to the perpetuation of error. Indeed, there is a tendency in some law offices, and we may even fear in some courts, to make every case turn on precedent, to the large neglect if not to the entire disregard of principles.

In some instances a former decision or at least former line of decisions may therefore be regarded as

little short of absolutely conclusive of the point involved in a subsequent law suit, and may justly be called imperative in an absolute sense, that is, such precedent or line of precedents may, under some circumstances, be practically controlling on the point to which it is cited, whether it convinces the mind of the judge or not.

In most instances, however, in which cases are used their value is less than conclusive. Sometimes the precedent falls almost within the imperative class, yet is not quite so, and from this they may diminish in importance, growing less and less in value until they become worthless and to cite them would only encumber the record.

From this it is apparent that it is very desirable indeed to know the tests by which to determine the value of a decision as authority and also to be skillful and sound in applying these tests. These are essential to enable the lawyer to judge the value of the decision for his own guidance in advising his client and in preparing his case. There is still another demand made upon the lawyer in the use of decisions in the trial of a case, and that is efficiency in presenting the decision to the judge and pointing out its connection with and applicability to the case at bar, and its force and effect on the point at issue. The first of these matters involves the elements of value in the decision

offered as an evidence of the law; the second involves tact and good judgment as a lawyer.

A Volume of Reports.

A volume of reports, as before stated, is a book made up of the opinions of a court or courts in different cases, together with such other matters connected with the cases as will make the opinions intelligible, and of such tables and indices as will make the book easy of use.

They differ in detail, but ordinarily have the following parts:

1. A title page, showing the title of the book—as "United States Reports," the court whose decisions are contained in the volume and the time covered by the reports, the name of the reporter and the number of the volume.

2. A table of the cases reported in the volume, arranged alphabetically by the names of the parties, with citation of the page on which the report of each case begins.

3. A table of the cases cited in the briefs of counsel and in the opinions of the court—arranged alphabetically by names of parties to the case cited, giving the volume and page, where the cited case is originally reported and the page in the volume of reports on which the citation is made.

4. The reports of the several cases contained in the volume, and

5. An index of the contents of the book by topics, which are arranged alphabetically, with reference to every case in the volume dealing with that topic, citing the cases by style and page.

This covers the contents of the ordinary volume of reports. Sometimes there are very valuable notes to a number of the reported cases, giving an outline of the matter passed on in the case and citing authorities bearing on it. This feature is unusual in official reports, but is coming to be quite common in reports published by private individuals.

On the back of the book it is customary to give the name of the report, the number of that particular book in the series to which it belongs and the name of the reporter. It was formerly the habit to designate the series of reports by calling it after the reporter by whom it was prepared. This is much less frequent now and the name of the court rendering the opinions or some other name arbitrarily chosen is used instead.

Official Reports.

Reports are either official or unofficial. The first are reports of court decisions published by the authority of the Government maintaining the court. In

these the opinions of the court designated for publication are put in possession of an officer of the court, called the court reporter, who also has access to the entire record of the case. From this data it is the reporter's business to make up the volume of reports. The decisions are published in full. The other portions of the report, which will be enumerated and discussed hereafter, the reporter prepares himself, with this exception, that sometimes the Judge rendering the opinion prepares the headnotes, and sometimes the statement of the case to accompany the opinion.

Unofficial Reports.

Unofficial reports are reports of court decisions published by private individuals.

The opinions themselves being matters of public record are not subject to copyright. Any one is entitled to obtain a copy of the record of any case or number of cases and print them in any way he sees fit, so long as he is respectful toward the court rendering the decisions. Consequently there are a number of editions of the reports of the decisions of the same court. These correspond exactly as to the opinions published, but as all the other portions of the volumes are private matter belonging to and

copyrighted by the several publishers, these are different in the different editions.

Reports of Selected Cases.

So far we have dealt with those series of reports which contain only the cases decided by one or more designated courts. There are, however, other publications in which selected decisions from a great many different courts are given. These are always private enterprises. Their value depends, first, on the judgment exercised in selecting the cases and, second, on the skill and care in the editorial work. A number of these selections are general, that is they undertake to cover all the principal topics of the law. Others are special, giving only cases on one or more designated and closely related matters.

Many of these sets of reports are very valuable as well because of the judgment used in selecting cases as the care and skill and learning displayed in reporting them as stated above. One of the features of value in some of these reports is the splendid annotations that are made of the matters covered by the reported cases. Some of these notes are very comprehensive and accurate and practically cover the authorities on the points dealt with. Some of the best work now being done on law publications is found in such notes.

The Report of a Case.

The report of a particaulr case ordinarily includes the following:

1. The Style of the Case.—This consists of the names of the parties. In the style the name of the person or persons who are dissatisfied with the result in the lower court and who are consequently seeking some relief in the higher court, usually appear first, followed by the word "against" or by the letters "vs." or "v.," this in turn being followed by the name of the person or persons who were successful in the lower court, and who consequently are interested in sustaining its judgment.

There are two prevailing methods of bringing a case from the court in which it was first tried to an appellate or higher court for the purpose of correcting errors in the trial. These are by appeal and by writ of error. A person bringing up a case by appeal is called an Appellant and the opposite party in such appeal is called the Appellee. The person bringing up a case by writ of error is called the Plaintiff in Error and the opposite party the Defendant in Error. Not infrequently these designations are placed in the style of the case as it appears in the report, just after the names of the respective parties, as "A. B. Appellant v. C. D. Appellee" or "A. B. Plaintiff in Error v. C. D. Defendant in Error."

2. Syllabus.—It is customary to follow the style and number of the case with a syllabus or head note. This is made out by the reporter, or in rare instances by the judge writing the opinion in the case. By whomsoever made out, this syllabus or head note contains a brief, terse statement of the several points of law which, in the belief of the person making it, are announced in the opinion. Usually an opinion covers more than one point, so there will be several paragraphs in the head notes, each treating of some one of the points decided. In the later and better reports each of these paragraphs is followed by small figures, which indicate the page on which the point covered by that paragraph of the head note appears.

3. Statements Regarding the Trial Court.—Next is given the court in which the case was tried and from which it comes to the court rendering the opinion, and not infrequently the name of the judge or judges rendering the judgment from which the appeal is prosecuted.

4. Statement of the Case.—Then comes a statement of such facts and parts of the record as are necessary to make the decision clear and intelligible; then the names of counsel representing the respective parties to the suit, and usually a summary of the briefs filed by them in the case.

5. Opinion.—After this statement comes the opin-

ion of the court. The opinion is the important part of the report of a case; it is the real matter of interest and to which all other parts of the report are but incidents. This contains a *resume* of as much of the record in the case as brought to that court, as the judge thinks is necessary to show the points involved and the way in which they came before the court, and then the reasoning of the court in the premises and citation of authorities and the decision on the several points submitted. When all the points are decided, the opinion usually sums up the result, by a general statement as to the disposition made of the case.

Frequently the date of delivering the opinion or handing it down as it is technically called, is given in connection with the report, either at the beginning or at the end. This is not true of many of the older reports, in which one often has to look to the beginning of the book and find the period covered by the reported cases and then guess at the exact date of the opinion.

All of the higher courts in the United States, both Federal and State, consist of several judges, the number varying from three to nine. When a case is submitted to the court, it is considered by the whole court in consultation. In these consultations the judges determine how the case is to be decided and some judge

is assigned to prepare the opinion. If the judges are agreed in their views as to the proper disposition of the case and as to the reasons for this action, usually only one opinion is prepared and filed. If they are not all agreed as to the disposition to be made of the case, the vote of the majority governs and the case is decided according to the majority view.

If the points of difference are material, frequently some one or more of the judges holding the minority view also prepare an opinion, to be filed and made part of the record. In this event the opinion of the majority is the opinion of the court, and contains the authoritative decision viewed either from the point of view of *res adjudicata* or of *stare decisis*.

Dissenting Opinions.

The opinion or opinions representing the minority view are called dissenting opinions. They have no authority as the action of the court, but express simply the individual judgment of the judge or judges filing or concurring in them. A dissent always weakens to some extent the force and authority of the opinion dissented from, as it shows clearly that the views held and announced by the majority of the judges were not so strongly supported by principle and precedent as to command unani-

mous concurrence of all the judges engaged in the trial of the case.

Several Majority Opinions in One Case.

Sometimes there are a still greater number of opinions filed in a case. It is not infrequent that the judges who agree in the decision to be rendered have different reasons for so doing. To illustrate, there may be two distinct reasons assigned by an appellant for the reversal of a judgment. Some of the judges think one point is well taken and that the judgment should be reversed for that. Other judges differ from this view, but think the case should be reversed on the second point. In such a case all the judges would vote to reverse the judgment, some acting on one ground, others on the other. Often under such circumstances, two opinions are handed down, each announcing the same result, the reversal of the judgment and concurrence in that, but setting out the different views of the judges as to the reasons for reversal.

Distinction Between the Opinion and the Decision.

From what has been said, it is manifest that there is real difference between the opinion in a case and the decision of it. These should be in perfect accord and in well considered cases and

carefully prepared opinions they are, but this is not always true. As we have seen, the opinion is the entire written instrument filed by the court, showing not only the conclusions arrived at by the court, and the reasons for so doing, but many incidental matters, such as arguments, illustrations, statements of broad and general principles which go beyond the issues in the case, etc. The reasons leading the court to make the decision may be based upon principle or authority or upon both. They may be set out fully or be stated very briefly. Sometimes they are not given at all, but the result or results only are declared. Frequently this expression of the reasons inducing the court to decide the points raised in the case and the other matters contained in the opinion are the individual work of the judge preparing the opinion. Sometimes the opinion is a vigorous and enlightening presentation of the matters involved and is well worthy of most serious study, but, unfortunately, this is not always true.

What Is the Decision?

The decision is the conclusion, or it may be series of conclusions arrived at and announced by the court, determining the several issues presented to it in the case. It is those portions of the opinion which announce the final determination of the court on the

questions at issue between the parties as presented by the record in the case. The decision in the strictest use of the term does not include the reasons or reasoning leading up to the result arrived at, but only the final conclusion of the court and enunciation by it as to what the law on the controverted point or points is. The decision is contained in the opinion, but is most frequently much narrower than the opinion.

As before stated, the decision as expressed in an opinion is the conclusion and enunciation by the court of the rule of law governing the rights of the parties as to the very matters submitted to the court for adjudication. It might be more briefly defined as the announced rule or rules of law, declared by the court to control the case.

Ratio Decidendi.

The *ratio decidendi* is the principle of law on which the rule announced in the decision is based, the legal spirit or reason for the decision or decisions.

Dicta.

All other matters in an opinion, whether a rule of law or legal principle not involved in the decision of the case, or the application of the declared rule or underlying principle to any other issue or state

of fact or hypothetical case or cases not then before the court are *obiter dicta*—words spoken by the way.

What Parts of an Opinion are Authoritative?

It is conceded on all hands that the decision in a case is highly persuasive in the court in which the decision was made and is imperative in all other courts subordinate to that rendering the decision as to the law involved in the decision. It seems on principle that the *ratio decidendi* ought to be equally binding, but examination of the cases does not sustain this to the full extent. The principal difference grows out of the fact that in almost every case the principle on which the decision rests is broader than the decision and hence there is more uncertainty as to the exact doctrine announced and a resulting fear on the part of counsel and the courts, especially the latter, lest the precedent be extended too far.

Dicta is never imperative authority, but is more or less persuasive according to the circumstances of the case.

Effect of a Decision as to Jurisdictional Questions.

It sometimes occurs that the record in a case discloses that the court in which it is filed has no jurisdiction over the case. The suit may be of a kind not within the court's power to hear. Or if the suit be

one within the general grant of jurisdiction to the court, the party preparing the case for revision in bringing up the transcript may have neglected to do some act made a condition precedent to the right of revision. In such instances the Appellate Court can not hear and determine the case on its merits, but will dismiss the appeal for want of jurisdiction. Such a judgment leaves the judgment of the lower court unaffected by the appeal.

In regard to points decided by the Appellate Court in cases of this kind, it has been argued that, as the court finally concludes that it has no jurisdiction over the case, nothing in the opinion delivered can be regarded as decision, and consequently can not be authority. This would be true as to the questions involved in the case not relating to or involved in the question of jurisdiction, but it is not sound as applied to the jurisdictional matters arising on the record. It is not only within the power of a court to pass on questions of its own jurisdiction, but it is its imperative duty to do so. No court has the legal right to consider and try a case not within the scope of its lawful authority. On the other hand, no court has the legal right to refuse to hear and determine any case which is within its jurisdiction. So the question of Jurisdiction arises upon or at least is involved in every application to a court for

relief. This question must be decided before the court can proceed in the matter. We may, therefore, say that the decisions of questions affecting its own power and authority are always within the jurisdiction of every court, and its conclusions regarding them are entitled to the full weight of decisions rendered by it. It is also within the power of every appellate court to pass on all questions relating to the jurisdiction of the court in which the case was tried and from whose judgment the appeal has been taken.

What Is the Opinion; What Parts of It Are Properly Regarded as Decision and What Dicta May Be Made Plainer by Illustration.

On pages 406 and 407 of Volume 37 of the Texas Reports, is given the report of a very short case, as follows:

"C. Chandler v. D. Deaton.

"Walker, J. It does not appear from the statement of facts in this case, except by inference, who shot the mules of the appellee; but it appears to be conceded by attorneys that they were shot by one or both of appellant's sons, who were minors at the time of the shooting. As a general rule of law, minors are liable for their own torts. The father is not liable in this action as the case is presented to us. There is no presumption growing out of the

domestic relation of parent and child, which would hold the father responsible for a crime or tort committed by his minor child, unless it be shown that the father is himself in some way implicated as principal or accessory; and there is no proof of anything of this kind in this case. Had it been shown on the trial that Chandler counseled or abetted his sons in shooting Deaton's mules, he might have been held responsible for the act; or, if he concealed the offense, knowing it to have been committed, he might be liable in a criminal prosecution; and there may be some doubt whether concealing a knowledge of the act might not be so far regarded as approbating and adopting the act of his sons as to make him liable in damages. This question does not arise in the case on the record before us, and we will not be understood as deciding it. The judgment of the District Court is reversed and the cause remanded.

"Reversed and remanded."

This gives us all we know about the facts or issues in the case. From this it is shown that a minor son or sons of C. Chandler had shot and injured two or more mules belonging to D. Deaton. That Deaton sued Chandler for the damages suffered by him on account of this shooting and proved the foregoing facts and on them recovered judgment in the lower

court against Chandler. Chandler appealed, insisting that on these facts he was not legally responsible to Deaton for the damages he had suffered. The exact legal question presented to the court, therefore, was, Is a father responsible to the owner of personal property for damages done to said property by a trespass committed by his minor son simply on account of the relationship between them? The Supreme Court decided that he was not. This answered the only legal question arising on the facts and is the whole of the decision. The reason for this decision, as stated in the opinion, is "There is no presumption growing out of the domestic relation of parent and child which would hold the father responsible for a crime or a tort committed by his minor child." This is an incomplete statment of the principle involved. It presupposes the real principle, viz.: That one person is not responsible in law for wrong committed by another, and announces that the relation of parent and child does not constitute an exception to this unexpressed general doctrine. Notwithstanding this incompleteness of expression, the general principle is easy of ascertainment. This general principle is the *ratio decidendi* of the decision.

All of the rest of the opinion is *dicta*. There was nothing in the case requiring or even per-

mitting an authoritative decision as to whether or not a minor is liable for his own tort. True, the tort was committed by a minor or minors, but neither of them was sued, no recovery was sought against them, yet the first proposition of law announced is "As a general rule of law, minors are liable for their own torts." This is a perfectly sound proposition frequently announced in cases involving the point, both before and since the decision of this case, but the question was not before the court in this litigation and hence this part of the opinion is *dicta*.

In stating the general rule of law on which the opinion is based, another *dictum* occurs. The doctrine is made to include crimes as well as torts. The suit was a civil one for damage, not a criminal prosecution and hence, although the rule announced is the law, the expression was uncalled for by the case and consequently can not be regarded as a point decided. The matter is, however, very closely connected with the point to be decided. The boys had shot and injured mules belonging to another. In all probability the shooting was both a tort against the owner of the mules and a crime against the State. The father was sued, simply because of the relationship between him and the wrong-doers. The principle he invoked for his defense was the broad one that the general rule of law is that one person is not responsible for

the conduct of another, and whoever seeks to enforce liability against one person for another's conduct must prove the special facts from which it legally arises. This applies to criminal liability as well as civil, and it was most natural for the court to have the two phases of the alleged shooting in mind when deciding the case. So the case, while not authority on the point of the parent's criminal liability for the wrongs of the minor son, might well be regarded as reasonably calculated to induce a judge in trying a case which did involve that point, to hold that the parent was not liable. The remainder of the opinion is confessedly *dicta*.

Language Broader Than the Issues.

One of the conditions under which it is frequently difficult to distinguish between decision and *ratio decidendi* on the one hand and *dicta* on the other, is when the language used to express the decision is broader than the issue before the court. In such instances, great care must be taken to ascertain the exact facts of the case and the extent of the issues submitted, and to limit the direct effect of the case to those facts and issues.

To illustrate. In the case of the National Bank v. Fink et al., 86 Texas, 303, an officer who was doing work in the discharge of his official duties,

which would entitle him to fees to be paid upon the completion of the work, gave a lien on a portion of his unearned fees, to secure the payment of a note. The note fell due and was not paid. The creditor sued on the note and to foreclose the lien. The Supreme Court decided that the attempted lien was against public policy and void. In the opinion, the court says: "It is contrary to the public policy of this State for a public officer to assign or give a lien upon his unearned compensation which is given by law whether such compensation be salary or fees, and any such assignment or lien is void." This enunciation goes beyond the point involved in the case in at least two respects, viz.: it includes assignments as well as liens, and salary as well as fees. This was perfectly natural on the part of the court. So far as it appeared from the record in that case, the same rules of policy would apply to both assignments and liens and also to salaries and to fees, but it is altogether within the range of human probability that some unexpected conditions might arise which would show a plain and important distinction.

This case is also an example of the statement of the rule of law broader than the *ratio decidendi* invoked to support it. In the opinion the principles on which the decision is based are said to be two; first, the tendency of such agreements to impoverish the

officer and thus unfit him for the proper discharge of his duties, and second, that already having received his compensation he would become indifferent to his duty and lose in zeal and efficiency. These doctrines apply to salaries and to many, even to most kinds of fees. But it can not properly be said to apply to all fees. Among the fees of county and district attorneys are commissions on money due to the State, collected by suit. Would either of the above objections apply to an agreement between the County Attorney and another lawyer, under which the other lawyer was to assist the County Attorney in the prosecution of the suits and collection of the money for a share in the contingent commissions? If such a case should arise, ought this decision, although in terms embracing the agreement involved, be held to vitiate the agreement, or would not the court rather limit the decision by the reasons given for it and fall back on another principle of the common law, viz.: the reason of the rule not applying, the rule will not be applied. These remarks are not made in any spirit of criticism of the courts, or of their opinions, but rather to incite and stimulate careful and discriminating study of all cases which come under review.

Judgments of Appellate Courts.

The judgment of a court is different from both the decision and the *ratio decidendi.*

The judgment of an appellate court is the final disposition made of the case in that court determining what is to be done concerning the judgment rendered between the parties to the litigation in the court below. It is no part of the opinion. It follows from the decision of the issues in the case as set out in the opinion and is pronounced by the court and entered of record in the minutes of the court. It may be either of several kinds of dispositions of the case in the appellate court.

If the appellate court decides all the material points raised in the appeal against the appellant, it will affirm the judgment of the lower court. This is called a judgment of affirmance.

If it finds material error in the record and all of the facts have been developed so that no further investigation as to the rights of the parties is necessary, it may set aside the judgment of the lower court and enter in the appellate court the judgment which the lower court should have rendered. Such a disposition is called reversing and rendering.

The higher court may find material error and the record from the lower court may be such as not to show a full and impartial investigation and deter-

mination of the matters of fact in the lower court. In such case, the judgment is reversed and the case remanded for further trial in the lower court, to be conducted in accordance with the rules of law announced in the decision of the case. This is called reversing the judgment and remanding the case.

Sometimes the matters submitted in a case are readily divisible, either by reference to parties or subject-matter, or to both. In such cases the court may find reversible error as to some parties or some subject-matter, but not as to others. Here the judgment might be affirmed as to one and reversed as to another.

Sometimes there is error in some one point or part of a case, which the court is not authorized to correct itself, but which may be corrected by action of one or more parties. In such instances, the court sometimes advises the parties that if specified action to cure such error be taken by them within a set time, that the error will be corrected and the judgment made to conform and that the judgment will be affirmed in its modified form. If parties comply, the court will modify the judgment and affirm it. If they do not comply, the judgment will be reversed and the case remanded for new trial.

CHAPTER FOUR.

TESTS OF AUTHORITY.

Precedent and Principle.

There are two tests by which to measure the correctness of any rule of conduct which is submitted as part of the common law. One is, Does the submitted rule conform to the antecedent decisions of the courts on that and analagous questions? the other is, Does it conform to the fundamental rules of conduct, which are recognized as morally right? Stated differently, the queries are, Is the rule supported by precedent? Is it supported by legal principle?

Precedent means previous decisions of courts of competent jurisdiction.

Legal principle means those moral doctrines which have been recognized by and incorporated into the law.

Establishment of Precedents Unavoidable.

The judicial function of the government extends only to the hearing and adjudication of actual cases. There must be actual parties, with actual legal rights and liabilities to be determined before the lawful powers of a court can be invoked and put forth. It

is the province of the courts to deal with past transactions and declare the rights of litigants as growing out of and dependent on these transactions. Primarily it is not within the province of a court to promulgate rules for future observance. It determines present rights, by applying existing rules of law to existing facts. That this process results in the establishment of judicial precedents which will be taken into account in future transactions and adjudications is a secondary and incidental matter. But though this is a secondary result, it is a most important and far-reaching one.

Whether this establishment of precedents is a making of law or simply a declaring and applying of preexisting law is a much mooted question which need not be discussed here. For whatever conclusion might be reached, the fact would remain that precedents evidence the law and that lawyers and judges do and will continue to rely upon and use them as such evidence. The practical question for us in this study is what are the elements of value in precedents as furnishing safe guides for the bench and bar, in the discharge of their respective duties?

Elements of Value in a Reported Case.

Purpose of investigation.—It is very evident that the published reports of different cases have different

value as evidence of the law. To appreciate and judge properly of this value we should have well defined and accurate ideas of the elements which constitute it. There are two points of view from which a decision is judged when considered as evidence of the law:

1. It may be looked to as evidence of the law generally or theoretically, without reference to any particular litigation.

2. It may be looked to as evidence of the rule of law which should govern in the decision of a particular law suit, pending or prospective.

The elements of value are largely the same from both points of view, but the emphasis on those elements is placed differently in different investigations. We will consider the two matters together indicating in the treatment the differences which exist.

Relation of the case to the point being investigated. —The first matter to be considered here is, what is the real significance and doctrine of the case; legally speaking, what does the case mean? To answer this, the case must be carefully studied and analyzed. The points decided and the rule of law announced must be distinguished from *dicta* contained in the opinion and the general doctrine—*ratio decidendi*—must be accurately ascertained. If analysis fails to disclose any legal connection or similarity between the case

being investigated as authority and the points of law under consideration and sought to be sustained, the case is worthless in that connection, and need not be considered further. If it does show such connection or similarity, then to ascertain its probative value other matters demand attention.

Points determining value.—These matters may be enumerated generally as follows:

1. The court deciding the case.
2. The manner of raising and submitting the point, whether incidentally or directly and with full argument of counsel.
3. The attention given the point by the court.
4. The judge delivering the opinion.
5. The number and character and applicability of the authorities cited and the thoroughness with which they are reviewed.
6. Conformity to or difference from the weight of authority, and
7. Last, but by no means least, the inherent strength, in morals and in logic, of the positions maintained by the decision; that is, the inherent merit of the principles announced.

All of the foregoing elements are to be considered whether the case is being studied as an authority generally or for use in some particular case.

When the decision is being considered as evidence

of the law in a particular case to be tried, the following additional elements enter in:

1. The relations between the court rendering the decision and the court in which the decision is to be used.

2. The relation of the court rendering the opinion to the question decided by it, and

3. The relation of the point decided to the point under consideration.

Application of these tests.—I do not mean that an attorney is always actually conscious that he is giving each of these matters consideration. Some lawyers have no tests and submit their authorities to none, and, on this account, generally succeed in losing their cases. With a good lawyer, the practice of testing authorities becomes so habitual that it is almost, if not quite, automatic. If the case he desires to use meets the requirements on all the indicated points, he feels a high degree of confidence in it. If it lack these he does not use it. If one cited by his adversary is deficient in any of these respects, he discovers and points out the defect. On the other hand, the poor lawyer either does not learn these tests, or else fails in their application. At no other point in the practice of the law is the necessity for personal good sense and individual aptitude more imperative than in weighing authori-

ties. After all that law schools and professors and books can do for students, there will still remain those wide differences in discernment and judgment that determine between failure and success at the bar. Outside helps are of great assistance, but, after all, if a man is ever a great lawyer, or even a really successful one, he must become so from within. There is no *ab extra* way to make a good lawyer.

The Court Deciding the Case.

Resuming the consideration of the elements of value in cases, we all recognize that there is an almost immeasurable distance between a justice court and the Supreme Court of the United States. Between these extremes America abounds in courts, differing in jurisdiction, organization, procedure and the personnel of their judges. In the Federal system, there are three courts of important jurisdiction, lower than the Supreme Court, viz.: Circuit Courts of Appeal, Circuit Courts, and District Courts. All of the decisions of the Circuit Court of Appeals and a fair number of those of the Circuit Courts, with an occasional one from a district court, are published. It is apparent that if there were two reported cases, one from the Supreme Court and one from the District Court, which were equal in every other respect, the one from the Supreme Court would

be of much greater value, both as a basis for learning the general theory of the law and as an authority in a particular case. The reasons for this are too obvious to need presentation. For the same reasons, though their force is somewhat weakened, a decision of a Circuit Court of Appeals is worth more than one of a Circuit Court. The same is true in our several State systems.

Other things being equal, the weight of a decision from a court of higher rank is greater than that of a decision of a lower court.

Reputation of Court Rendering Opinion.

Apart from these relations between the courts, which we will consider hereafter, there are other conditions under which the reputation of the court delivering the opinion enters into the value of the case. Each State in the Union has a court of last resort in civil matters. Each of these courts is constantly handing down opinions. These are published and go out to the profession throughout the States. The work of one of these courts may be better than that of another. In the course of time this difference makes itself appreciated by the bench and bar of the country. The lawyers come to rely with more confidence upon and the courts to give greater weight to the decisions of

the tribunal which has approved itself, than to those whose work has not been so good. This is but just and right. It is only judging each of the two by its work. Good work builds good reputation, inferior work builds bad reputation.

Reputation of the Judge.

Closely related to the foregoing is the fact that the reputation of the judge delivering an opinion frequently enters largely into its value. The known capacity, learning, care and righteousness of the judge must give character to his decisions. Where is the lawyer to be found who does not give heed to Chief Justice Marshall when he speaks on constitutional questions, or to Judge Storey when he declares a maxim in Equity. We might almost say that there are some names which, appearing on an opinion, insure its careful and exhaustive consideration, while there are others which are forgotten before the reading of the opinion is completed. This fact is inherent in human nature. When the Declaration of Independence asserts that all men are equal, it is not speaking of judges.

Care in Arriving at the Decision.

The next three points, the manner of submission, the attention given to the case by the court, and the

number, character and applicability of the authorities cited, may well be considered together. All these go to the thoroughness and care with which the case has been presented and tried. If an inspection of the record shows a case to have been really understood by counsel so that the legal points were clearly reserved and presented before the court, and that the authorities bearing upon them were properly submitted and that the issues and authorities were well and exhaustively argued, and in addition that the court had given due and painstaking consideration to all the points and had come to its conclusion only after full advice and due deliberation, then the decision is, of necessity, worth more than if the record shows lack of preparation and haste in submission by counsel, and hurry and indifference in consideration by the court.

Conformity to Precedent and Principle.

The next two points, conformity to weight of authority and the inherent merit of the principles announced, go to the substance of the decision itself, stripped of all extraneous considerations, and bring us to the very heart of the matter.

Strong indeed is the decision which is clearly supported by both precedent and principle. It is almost impregnable. The decision which is supported by

one and opposed by the other is on much weaker ground. As to which is stronger, precedent or principle, opinion is divided. Controversy concerning the two rarely arises on points on which there is written law. When it does, it is usually confined to questions of construction of a constitution or statute. The great battle field is on points as to which the written law is silent and on which, by some misfortune, an improvident and undesirable decision or line of decisions has been rendered.

On the one hand it is contended that as the rule originated with or at least was first promulgated by the courts, the power which practically made it law should have the same authority to destroy it. On the other hand it is contended that as the rule has been announced and accepted as law and has entered into the business life and habits of the people whose rights have grown up under it, no power save the Legislature should have the authority to change it, and thus disturb the rights which have been created in reliance on the rule.

The question thus presented is a practical and serious one. Its answer is difficult and different courts and the same court at different times and on different occasions have answered it differently.

It must be admitted that a court of last resort may, in its sound discretion, decline to follow prece-

dents and decide a common law question according to its best judgment as to what is, legally speaking, right and just between the parties. Examples of such action are constantly arising.

On the other hand, it must be admitted that this power is not to be exercised except upon most serious consideration and for most weighty reasons. When the proper occasion has arisen can only be determined by the court before which the issue is pending.

General Discussion of Precedent and Principle.

Perhaps the matter may be cleared up somewhat by a discussion going back to the foundations of our laws.

Law is founded on morals. The real base of every rule of conduct established under a democratic form of government is the people's idea of justice, on the question at the time the rule is made. The reason for this is found in the nature and sources of law. The real matter with which law deals is human conduct. Persons and things are affected by law only so far as it determines what courses of conduct persons shall pursue, what must and what must not be done or omitted by the individuals subject to the law. To state it briefly yet accurately, law is a system or body of rules of conduct, to be obeyed by those to whom the rules are directed.

Law and Public Opinion.

The source of law in all popular government, whatever the government may be called, is the public judgment and conscience of the people. Not the judgment and conscience of the best members of the community nor yet of the worst, but the ordinary, average or common judgment and conscience. In such a government the persons who make these rules are themselves to obey them. They are in the main accustomed to regulate their lives by ethical standards, and to insist that others in dealing with them shall do likewise. It is therefore inevitable that the people, when they deliberately consider rules to be established by the community at large for observance by all its members in their dealing among themselves, shall test and frame these rules by the same standards of right and propriety. So the written laws of such a community, the rules consciously and purposely enacted as such, are based upon and grow out of moral principles. This is true to even a larger extent when there has been no previous conscious effort at legislation on a question, which comes up for adjudication before a court. Here the judge must go back to fundamentals as understood and manifested in the lives and customs of the people among whom the transactions out of which the litigation grows occurred. This it is that gives to the common law its wonderful elasticity

and fitness to all peoples and all conditions. It is but the common conscience formulated and enforced by constituted authority which is in sympathy with such conscience. It does not matter here whether we regard ethical principles as absolute and dogmatic or as wrought out by the slow process of experience. All peoples have ideas and convictions of moral propriety and any people which makes its own laws of necessity embodies and manifests these ideas and convictions in the rules which it proposes to enforce against itself. As these ideas of moral propriety grow and develop, the law grows and develops with them. Usually it is little behind the moral development, once in a great while it is in advance of it. It never consciously identifies itself with wrong. If perchance it is misled into error it struggles back to the right, so that each advancing year narrows the margin which separates between the two great bulwarks of the world's safety, Law and Justice.

Conflict Between Precedent and Principle.

The obstacles in the path of ethical development are many; those in the path of legal development are more. One of these additional difficulties is found in the law's veneration for precedent as such. It may be true that "There were giants in the days" when precedents were first established, but it is equally true

that "the pigmy now standing on the shoulders of the giant sees further than the giant himself ever saw." It is a matter of general enlightenment. Sometime in the past a court of able judges, men learned in the law and earnest in their desires to do justice, found itself confronted with a question which must be decided in order to render judgment in a case properly pending before it. The one impossible thing was to leave the case undecided. That was the only thing the court could not, to some extent, justify itself in doing. The judges searched with the best light they had, used their best information and judgment and declared the rule. The same question arose again in another case before another court. This court was confronted with the same difficulty, except that it had the benefit of the one former decision by the other court. It followed that and decided the second case in accordance therewith, and afterward, a third and a fourth case passed into judgment, all asserting the same rule of conduct. Later in the history of the same people, after their ideas of right have broadened and deepened, when they know more of the differences between right and wrong, the same question arises before a court, the judges of which can see clearly that the old decisions and the rule announced by them were wrong. What is to be done? A question not easily answered, indeed a question not

to be answered at all from a statement of the case so meager as that just given.

In varying facts and under varying circumstances, this question has arisen practically before many courts. The answers are far from uniform. The two theories regarding the situation are these. The first is, that the precedent must stand, and that relief, as to future cases, must be obtained by litigation. The second is, that the courts must never be the conscious instruments of known injustice unless there is some imperative rule of written law requiring it. In different cases and under differing circumstances, the same court may assume both these attitudes, holding itself bound by the precedents in the one case, and refusing to follow them in another.

Effect of Precedent.

The weight of authority seems to say first, that established precedent should always control in cases simply of expediency and of business regulation which do not go deep enough to involve any real question of moral principle; second, that in cases in which absolute moral wrong would result from following the precedent it should be disregarded, and third, that in doubtful cases the benefit of the doubt should be given rule of property.

Instances of Disregard of Precedent.

The English cases on the question of sharing in profits as a test of partnership seem to me to give a splendid example of a court's refusal to follow precedent when it sees plainly that to do so is to legally sustain practical injustice. In this instance the departure from precedent was made even though the matter involved from one point of view might well be regarded as matter of business regulation and a rule of property.

Sometimes bad precedents are, so to speak, removed by the slow processes of attrition. A rule is announced, an analagous case arises later, to which the rule is sought to be applied by counsel. The court refuses to extend the rule to the analagous case. Another case a little more like the first arises, the court again refuses to extend the precedent, though the facts of this third case bring it clearly within the reasoning and principle of the first. At length a case arises identical with the first. The court says, the doctrine announced in the first case is applicable in this, but it has been criticized here and limited there and finally denied, so that we regard it as inconsistent with these latter cases and, hence, refuse to follow it. They then decide the case pending before them in accordance with the later decisions and the precedent is destroyed. As an example of this process see the

Texas cases on the "Turn Table" doctrine, which are given hereafter.

Thus principle encroaches on precedent and the law grows toward the unattainable goal of perfection.

Author's Views as to Precedent and Principle.

My own views may be briefly expressed thus: 1. Precedent supported by principle should always be followed. 2. Precedent should be followed in matters of business and of procedure which do not violate principles and which have become known and have been acted on in the community so that rights have grown up thereunder. 3. Precedent should be followed in those cases in which there may be moral questions involved and in which there is only doubt as to the moral propriety of the precedent. In all these instances if a change is desirable, it should be sought and obtained through the legislative branch of the government. But in those cases which do not involve business rules or rules of propriety merely, in which it is clear that the moral sense of the people has grown since the precedent was established and the precedent is such as to be opposed to the *common judgment* and *conscience* of the *community*—the courts are no longer bound by the precedent and should refuse to follow it. I do not mean the judgment or conscience of the judge trying the case should be taken as the standard,

but the *common judgment* and *conscience* of the *people* as *manifested* in *their daily lives and habits.* It was this common judgment and conscience which made the rule in the first instance and under the conditions named I think the same authority has power to repudiate it. Applying to these an ancient maxim, I would say, "The reason of the rule," in this case the people's sense of justice and right, *"having failed, the rule itself should fail."*

Elements of Value of a Decision as Evidence of the Law in a Particular Case.

When we pass to this view, we must not lose sight of any of the matters just discussed. They are as applicable and cogent here as in the connection in which they were presented, but as stated before, there are a few additional matters to be considered. The first of these is the relation between the court rendering the decision and the court in which it is to be used as an authority. Several aspects of this matter were dealt with under the former head, that of the court delivering the decision, but a little more should be said here.

Relations of Court Delivering the Opinion to the Court Before Which it is Cited.

In addition to the general questions as to the differences in the dignity, position, and standing of the court rendering the opinion, which enter into the intrinsic value of the decision, often the direct relations between the two courts, that is, between the court rendering the opinion and the court in which the decision is invoked as authority, is often of controlling importance.

In the Federal Government and in each State there is a judicial system, that is, each government maintains a number of classes of courts, each with ascertained jurisdiction. These courts are graded, extending from the lowest with least extensive and least important jurisdiction, through the several intermediate classes, up to the highest appellate tribunal. Cases tried in one of these classes of courts may, in almost all instances, be carried to one or more of the higher courts in the system, for revision.

It is readily apparent that the lower court must follow the decisions of the court having the power and right to revise its action and set aside its judgment. Under such conditions it is practically useless for the lower court to render a judgment which it is morally certain will be set aside by the appellate court. It is much quicker and less expensive to follow the prece-

dents of the higher courts, and render judgment in accordance with them and let the reform be made in the higher courts than it is to disregard these precedents and have the judgments reversed and cases sent back for a new trial in accordance with the established rule.

Thus a decision of the Supreme Court of Alabama would be controlling on a circuit court in that State while the same Alabama case would be only persuasive in any other State. The opinion would be the same and the reasons and authorities for the decision would be the same but the Circuit Court of Alabama is under control of the Supreme Court of that State, and if the Circuit Court refused to follow it, it could set the judgment aside and substitute its own judgment therefor. This the Alabama court could not do as to a case tried in any other State.

Again, there are a number of different courts in many of the classes of courts maintained in the United States, and in each State. To illustrate, there are nine United States Circuit Courts of Appeals. Each of these has just the same power and jurisdiction and dignity. No one of them can control the action of any other of them. The opinions of any one of these courts are persuasive merely in any other one of them. They strive for unanimity of opinion and certainty in the law and, hence, each of them tries to keep in line

with all the others. These considerations are clearly addressed to the judgment of the tribunal passing on the question. They tend to persuade the judge to concur in the previous decision but do not speak with the voice of command.

Relation Between the Court Rendering the Opinion and the Questions Decided.

We next consider the relation between the court rendering the decision and the question decided in the opinion. If the question is one peculiarly and finally within the jurisdiction of the court giving the opinion, its decision is practically conclusive on all other courts. For example. A question as to the proper construction of any clause of the Federal Constitution is finally to be determined by the Supreme Court of the United States. If, therefore, that court renders a decision interpreting and applying any clause of the Federal Constitution, this decision is binding on all other courts, State or Federal.

But the Supreme Court of the United States has no final jurisdiction over common law matters, so that if, in the same case, a question of common law were presented and the court passed upon and decided it, no State court would be compelled to recognize and follow that portion of the decision. Its effect would be persuasive only, not imperative.

Again, the construction and meaning of the Constitution of a State is to be determined by the Supreme Court of the State and the interpretation put upon such instrument by such a court is binding on all other courts, State or Federal. But if the State court should pass on a matter of common law or undertake to give a construction to the Constitution of the United States, these parts of the decision would be persuasive only except in courts directly inferior to and answerable to the court rendering the opinion.

This discussion has brought us dangerously near the mooted question whether or not there is any Federal common law. But a discussion of the question may be waived since the practical results are the same, no matter which way the decision may go, for it must be conceded that there are questions coming before the Federal Courts that can not be decided from the written law, and whether we call these questions and the rules determining them general law or common law makes no difference as to the imperative or persuasive nature of the decisions.

Cases Directly in Point and Analogous Cases.

The next point of interest is the relation of the point decided in the case sought to be used as authority to the point at issue in the case at bar. If the issues in the two cases are such that both the decis-

ion and the reason for the decision of the former bear directly upon the issues in the case at bar, the proposed case may well be considered as one directly in point and entitled to great, if not controlling, weight. On the other hand, if either the decision or its reason is directly in point, but the other is not or does not include the case at bar, the force of the reported decision is much weakened. If neither the decision nor the reason directly embraces the case at bar, but the matters in controversy are closely related to the matters decided in the first case, there would be an analogy between the two and the force and value of the cited case would depend upon the strength of the analogy. If there be nothing, legally speaking, in common between the two cases, the opinion is entirely irrelevant, without force or effect.

Much of the argument of counsel on questions of law is directed to these points, the attorney citing the case insisting upon its applicability and consequent weight with the judge, the opposing counsel attempting to show as much dissimilarity between the cases and the issues and points involved as the record will admit of.

CHAPTER FIVE.

BOOKS OF THE UNWRITTEN LAW RESUMED.

Decisions of Legal Tribunals Not Courts.

There is another class of books which deserves some attention. This consists of the proceedings of such tribunals as the Interstate Commerce Commission, Railroad Commissions, and other similar bodies. The number of such commissions is increasing and their jurisdiction and activities are extending rapidly. The chief reasons seem to be, first, that they unify and centralize power, and, second, that they are continuously in session.

Their published reports are authentic accounts of the proceedings which take place before them, and they contain much of importance and great concern to the public and the profession. These commissions have not yet attained the uniformity of procedure and of reporting which is necessary to give uniformity and distinctiveness to their reports. Hence, enumeration is impossible and description impracticable.

Quite a number of lawyers appear before these bodies in the interests of their clients and the practice is quite lucrative. Each commission promulgates its own rules of practice, subject, of course, to the

general plan provided in the Statutes creating it. These rules are usually published and may be procured by those interested, from the commission itself or from those who have published them under its direction and supervision.

Digests.

The number of the cases in any series of court reports is so large that it is extremely difficult and tedious for the practicing lawyer to undertake to look through them and see for himself what the reports contain on any point of law. To make such a search as to every point coming up for investigation would be altogether impossible.

To obviate this difficulty, different persons have undertaken to analyze the different cases in the different series of reports, to systematize the points decided and the holdings on these points and arrange these in alphabetical order according to the topics dealt with and to publish these holdings in separate books, citing the case or cases from which they are taken. These books are called Digests of the Reports, the contents of which they epitomize and arrange.

This work in its first stages is of just the same kind as that done by a reporter in writing the syllabus of a case. When the different points in the case are ascertained, they are arranged under appropriate

headings indicating the topics treated of, and so much of this syllabus as deals with each of these topics is placed together.

Then all the other cases in the set of reports being digested are treated in the same way, using in all the same headings for the same topics. After all the points dealt with in all the cases are ascertained, so much of these as pertain to each topic are then put together in systematic arrangement under the general head of that topic. This arrangement must be very carefully and properly done or the work will be of little practical value. If it is well done, the digest gives a key or index to the series of reports covered by it and by consulting it carefully under the appropriate heads the lawyer can in a short while find every case contained in the series of reports which discusses the general question he is interested in, and can also find the detailed and especial points raised and decided under the general heads.

To illustrate: An attorney is consulted about a case involving the right of a man who has shipped some commodity by rail from one State to another. He wants to sue in the Federal Courts, claiming some right based on the Federal Constitution and statutes. It is therefore essential for him to know what the Supreme Court of the United States has

held on the general questions of what is Commerce within the meaning of the United States Constitution, and also what the court has held as to the particular points arising in the particular case.

There are a great number of United States Supreme Court Reports, over 200. If he were compelled to look through all these volumes on all the points involved in his case, the labor and time involved would be very great. If, however, he has a United States Digest, the labor of finding the cases and arranging them has been done for him. The maker of the Digest has looked through the reports, not only on the subject of Commerce, but on all other subjects passed on in the cases, has collected the different points and arranged them systematically under the several topics under proper headings. So the lawyer takes his Digest of these reports, turns to the topic of Commerce, and under that looks at the several sub-heads until he finds the exact points in which he is interested, sees what the Digest contains as to these, and picking out the cases really in point, procures the volume or volumes of the reports containing the decisions on these points, turns to the page given in the Digest, and has before him the cases controlling the question.

The foregoing statements are made on the presumption that the Digest is well and carefully made and

that the lawyer understands its use. If the work of the digester were careless and inaccurate, or if the lawyer does not know under what topics or heads to look, he gets but little benefit from consulting the Digest.

It too frequently happens that the maker of the Digest relies implicitly on the work done by the reporter and does not himself read and analyze the opinions. In such case, he simply turns to the back of each volume of the reports, examines the index and arranges *all* the matter in *all* of the indices of *all* the reports in alphabetical order, combining *all* that he finds in *all* the indices on any one subject, under that head in the Digest. When made by this process the Digest is simply a condensation of the several indices to the different volumes, and its only merit is to limit the investigation to one book and so prevent the handling of all the volumes separately.

Valuable Features of the Later Digest Are the Scope Notes and Copious Cross-References.

These appear at the beginning of the treatment of each topic, and the cross-references are also sometimes carried into the subdivisions. The scope note gives you information as to the matter that is covered in that Digest under the topic at which you are then

looking. The cross-references refer you to kindred topics and headings, under which the point in which you are interested may be treated in the digest. A careful study of these statements and references will frequently direct the lawyer to the portion of the Digest in which the exact point he wishes is treated.

Use of Digests.

To know how to handle a Digest requires considerable knowledge of legal terms and forms of expression and of the relations and connections between different legal topics. Each Digester has his own plan and catch words. No uniformity has yet been secured on these points. It is, therefore, very desirable for every lawyer to be familiar with the plan and arrangement of every Digest which he undertakes to use. Hence, he should study its introduction and preface and familiarize himself as fully as possible with its method and arrangement. Even after he has done this and really believes himself to be well acquainted with the work, he should never be content with looking under one heading or catchword, unless he has found under it the very matter he is seeking.

If he does not find it under the heading which he thinks the most appropriate, it may be in the Digest under some other head. This would only mean a

difference of opinion between him and the man who made the Digest as to the most appropriate place to put the matter. He should think up the next most appropriate head and look under that, and so on, going from one head to another, until he finds what he wants or exhausts all probable heads under which to find it.

There are a great many Digests published. Every set of Reports of any size or importance has its accompanying Digest. Besides all these, the West Publishing Company has gotten out "A Century Digest," which is a consolidated Digest of all the series of official reports in the United States, and also of the very numerous sets of Reports published by that company. It is the most complete Digest of American case law in existence. It was published some years ago, but is now followed up by a publication by the same company of a "Decennial Digest" on the same order, bringing the work practically down to date.

Finding Authorities from a Particular Case.

Another method of finding authorities is to hunt up a case which bears upon the point being investigated, and use it as a basis for further search. This search can be made to cover both the cases which precede the one used as a basis of work and those which come after it. The processes are different.

Finding the Older Cases.—To do this the attorney selects the case bearing on the point he is investigating and gets the cases cited in that in the briefs of the attorneys and in the opinion of the court on the particular question under consideration. This will give him references to leading cases on the subject which are older than the case with which he began. By finding all these cases, and getting the cases on the point cited in the briefs and opinion in each of them and going through the same process with each of these, the lawyer is enabled to trace the law backward from his starting point, that is, from the first case examined by him; but this method can not possibly lead him to any case or other authority later than the case with which he began.

Finding the Later Cases.—If the case with which the attorney began is one of importance, it has probably been cited in a number of cases since, and if these could be found, the lawyer would not only find what these later cases hold themselves, but he would also find the exact present standing of the case with which he began. Both these are important points to know. This process of tracing the history of a particular case and getting later decisions on the points involved, can be done by another kind of books called books of citations. These differ from one another in detail,

but the main purpose and value of them all is found in the fact that they trace cases in and through all subsequent reports and lead you, in that way, to the new cases on the subject and the discussions which have been had of the cases you have found.

Books of Citations.

You will remember that one of the parts of a volume of reports is a table of all cases cited in the volume, with a reference to the report in which these cited cases were originally published. It is therefore apparent that by taking the name of any case and running through the tables of citations in all sets of reports of subsequent decisions each instance in which the case has been cited can be found. This process takes trouble and time. So in order to aid the practicing lawyer and save his time, different persons have done this work for him.

For example: Take the famous case of McCulloch vs. Maryland, decided by the Supreme Court of the United States in 1819 and reported in 4 Wheaton, 316. This is a leading case on the proper construction of the Federal Constitution. It has been cited a great number of times by a great many courts, both Federal and State. Each citation in any one of these courts can be found by examining the Reports themselves. Many of these citations can be found by con-

sulting the tables of cases cited in the different volumes of each set of Reports. But this takes time and trouble.

This work has been done and the results tabulated and printed. It is much easier for a lawyer to look to this tabulated statement than to go through all the reports themselves. So he buys a Citator or some other book of citations and gets his information from that.

Different Kinds of.

These books of citation are of different kinds. The most frequent form consists of tabulated statements of the citations merely, giving some information regarding the case cited by means of letters and figures and abbreviations, the meaning and use of which are explained in the introductory portions of the book. Another method is to give the style of the case and then make extracts or condensations of the references made to it in the subsequent cases, giving the citation by which to enable the lawyer to find the citing case. This method produces a much more voluminous book than the numerical citations employed in the method first referred to. The plan and scope of every book of citations must be carefully studied to enable any one to use it to any advantage. When properly understood and used, they are of great advantage.

Law Dictionaries.

These, as the name imports, are dictionaries defining law terms and phrases. In some the treatment is meager, consisting of only short statements of the meaning of the words. Others are much more elaborate and give not only a brief definition of the terms, but also a considerable amount of expository matter and cite numerous authorities. No law library is complete which does not have one or more first class Law Dictionaries.

Text-Books—Generally.

Text-books are not books of direct authority. Their value as persuasive evidence of the law depends upon the reputation of the author, the inherent merit of the book, and the weight and applicability of the authorities cited. Perhaps the chief values of a text-book are found in the thoroughness and logic of its outline of the subject in hand, its clearness of style, and its conformity to the applicable constitutional and statutory authorities and to the decisions of the courts.

Some of these books are merely short, logical, scientific outlines of the subjects treated, while others extend to many volumes of detail, some being so voluminous as to discourage both the student and the practicing lawyer. The large majority of these books lie between the two extremes just mentioned, combining

or attempting to combine the scientific analysis and logical arrangement of the elementary work with sufficient detail in treatment to supply the practitioner with all the information he may need in applying the general doctrines to the particular states of fact which he may encounter in the course of his practice.

Many of these treatises are of great value, while some are unfortunately scarcely to be rated with poor digests. They are not so numerous as the Reports of adjudged cases, but there are still enough of them to constantly remind the lawyer who attempts to keep his library reasonably supplied, of the old proverb, "That of the making of many books there is no end."

Mechanical Features.

The mechanical features of a text-book are, first, its back, with its title, and frequently the name of the author; second, the title pages, giving the name and date of publication and name of the publisher and notice of copyright; third, preface; fourth, table of contents; fifth, table of cases, though sometimes this appears at the back just before the index; sixth, the body of the book or text, which is divided into chapters under appropriate headings, which are again subdivided into paragraphs and sections; seventh, footnotes, in which are cited authorities sustaining or supplementing the text; eighth, the appendix, in which

may be placed matters referred to in the body of the book which are too lengthy to be conveniently included in the text or accompanying foot-notes; ninth, the index, which, if properly prepared, includes, under appropriate heads, references to the places in the book in which the treatment of all matters included in the text may be found.

Many of these different parts need no explanation, others should receive some consideration.

Preface.

The Preface of a book is the author's explanation of his purpose in writing the book and of the plan on which it is prepared. It usually gives a very general conception of the author's view of his subject and of the conditions which make its publication desirable from his standpoint.

Table of Contents.

The Table of Contents is the outline of the subject, showing the several parts into which the author has divided it, the chapter headings and frequently the several paragraph headings.

As the preface shows the general ideas of the author as to his subject, so the Table of Contents indicates his grasp of and control over it, his power to analyze it and to co-ordinate and systematize its sev-

eral parts. It is impossible to present a subject scientifically and exhaustively unless it has first been properly outlined in the author's mind, so it is almost universally true that as is the Table of Contents so is the book built upon it. In buying law books, examine the Tables of Contents and if they are not well thought out and logically arranged, it is not safe to invest.

Table of Cases.

This is a table of all the cases cited in the book giving the report in which each originally appears, with citation to the page or pages in the text-book on which reference is made to the case, arranged in alphabetical order.

To men who are familiar with many cases, knowing them by name and remembering the points raised and decided in them, these tables of cases are of great help. They constitute as it were a duplicate index to the contents of the book.

The Text.

This is the body of the book. It is the outline of the subject, clothed with flesh and sinew and muscle —the perfected body built upon the skeleton set out in the table of contents.

In it the author puts forth his views and judgment

as to the topic under treatment, fortifying his opinions and statements by such reasons and authorities as he is able to command. If it is a book of any value as a text much of the author's personality has gone into it. It is the child of his brain and by the laws of heredity must resemble him from whom it proceeds.

Unfortunately there are many text-books which may properly be called commercial rather than legal literature. Judging from their character, their reason for being is the hope of the author or some one co-operating with him to make money by the publication. Such books are usually about of the calibre of hastily constructed and poorly arranged digests. They represent nothing original except original sin.

In sharp contrast with these are those text-books which are the result of years of patient and earnest effort. Books in which are found the ripened fruits of long experience and profound thought which bear a message of truth from real scholarship and thorough preparedness.

None of these books are books of direct authority, conclusive on the courts. It is apparent that their persuasiveness will vary greatly, being measured by the nature and characteristics of the particular volume. It would be difficult to find a court which would entirely ignore a citation to Cooley's Torts or Pomeroy's Equity and almost equally difficult to find one

which would pay attention to many other texts, which need not be named here.

Foot Notes.

It is quite usual for authors of text-books to sustain the legal propositions stated in the text by citations from other law books bearing on the subject. These citations sometimes appear in the body of the text, but in most instances a small figure is inserted just over some leading word in the text, placing a corresponding figure at or near the bottom of the page, immediately following which the citations are given. These citations added at the bottom of the pages are called foot-notes. It is not infrequent to incorporate in the foot-notes brief quotations from the books cited or condensed statements containing the doctrine or principles announced in the citation.

The Index.

The Index is one of the most important parts of a book. Its purpose is to furnish a quick, accurate and comprehensive guide to the contents of the book. In it should appear under every appropriate head and catch-word references to every matter of any consequence set out in the text. The table of contents gives you a general idea of the author's mastery over and organization of his subject. The Index gives

you a grasp on the contents of the book as it is written. The table of contents ought to bring one near to every matter treated, the Index should bring him in direct contact with it. A good book with an inadequate index loses half its value. It is a storehouse of good things locked and without a key—its treasures are inaccessible.

Encyclopedias of Law.

These are books which take up the law under all of its different heads or topics, arrange these in alphabetical order and give a more or less extensive treatment to each topic, assigning to it such space as its relative importance, as judged by the editor, may require. These different treatises are written in much the same manner as ordinary text-books on the same subjects except that the proportion between outline and detail is different. A large part of the Encyclopedic work consists in a logical arrangement and brief statement of the present rules of law on the topic under consideration. Ordinarily, the underlying principles are not developed and no attempt at detailed application of the rules is attempted in the text.

The text is supplemented by very extensive notes, citing large numbers of cases bearing on the matters contained in the text. Frequently the arrangement

of these notes is very convenient and the judgment shown in their selection good.

The treatment of each topic is introduced by an exhaustive outline, showing its main divisions and the subdivisions of these. This outline is valuable as giving a comprehensive view of the framework of the article, which is built upon it. It also answers well the purpose of an index, as it goes so much into detail that it points out with fair accuracy just where each part of the subject is treated. Each of these headings is followed by a reference to the page on which that specific point is taken up. There are also references in the text by means of figures, to the notes below and these give a quite exhaustive citation of cases, usually directly to the point.

The value of the text in an Encyclopedia is determined by exactly the same tests as that of a text-book. These have already been given under that heading. The value of the notes is tested just as that of a digest. These have also been given.

Taking the whole book into consideration, an Encyclopedia has much in it resembling a text-book and much resembling a good digest. The combination is convenient and useful and such books are of great practical value.

As the attempt is to cover the whole body of the law in a somewhat exhaustive manner, an Encyclo-

pedia usually extends over many large volumes, some of them running as high as 35 to 40 books of from 1200 to 1400 large pages, closely printed.

Law Magazines.

Another form of legal literature is the Law Magazine or periodical. These are serial publications having quite a variety of contents. They are devoted principally to:

1. The discussion of legal subjects of general interest.
2. The criticism of leading cases as these appear from time to time.
3. Short references to important points decided in the current reports, and
4. To current legal news such as meetings of bar associations, changes in the courts or judges, the death of prominent lawyers, and such items.

Many of the articles appearing in them are very instructive and present strongly the arguments pro and con on mooted legal questions. These are very improving and often practically helpful.

CHAPTER SIX.

CASES FOR ANALYSIS.

Questions to Be Answered in Each Case.

In order to acquire facility in putting into practice the doctrines presented in the foregoing pages, an outline of the points to be considered in connection with each case is given in the form of a series of questions, and this is followed by six cases, to be analyzed by the students. Each student should be required to hand in a written answer to each one of the several questions as applied to each of the six cases.

Questions to be answered as to each case studied:

1. Style of case.
2. Date of opinion.
3. Court rendering decision.
4. The judge writing the opinion.
5. Court in which litigation was begun.
6. Who was plaintiff in lower court?
7. Who was defendant in lower court?
8. On what facts did the plaintiff base his claim, covering the three points: first, Plaintiff's right; second, Defendant's wrong; third, The consequent damage?

9. On what points of law did the plaintiff base his contention on these three points?

10. How were the issues joined and how were the questions presented in the lower court?

11. What did the lower court hold on the questions of law?

12. What did the lower court find to be the facts?

13. For whom did the lower court give judgment and the nature and extent of the remedy awarded?

14. What points of practice arose in the trial Court?

15. How were the different points made in the lower court reserved for submission to the Appellate Court?

16. How was the case carried from the trial court to the court rendering the decision?

17. What points were presented by the Appellant or Plaintiff in Error in the Appellate Court for the purpose of reversal?

18. What was the contention of the Appellant as to the law on each of these points?

19. What was the contention of the Appellant as to the facts on each of these points?

20. What was the reply by Appellee to each of the Appellant's points of law?

21. What was the reply by the Appellee to each of the appellant's contentions as to the facts?

22. What was the holding of the court on each of these points of law and fact respectively?

23. What were the reasons given by the court for each of the holdings of the court on each point of law and of fact?

24. What principle or principles does the case teach?

25. What parts of the opinion are *dicta*, and why?

26. What was the judgment of the court rendering the opinion?

27. Does the decision conform to the decisions of other cases on the same points?

The first of the cases given for analysis was selected because of the clearness of its statements and nicety of distinctions.

In order to illustrate, in a measure, the process by which courts change precedents, or gradually relieve themselves from their supposedly binding effect, we have chosen as the last five cases a series of opinions on the subject of the owner's liability to children unintentionally injured on his premises, after being enticed thereon by something kept there by the owner, which is of more than ordinary attractiveness to children.

THE SUPREME COURT OF TEXAS.

CORNELIUS McCOY vs. THE STATE.

Galveston, 1860.

25 Texas, 33.

Appeal from Gonzales on a writ of habeas corpus granted by the Hon. Fielding Jones, and tried before him on the application of the prisoner for bail, after indictment found.

Indictment for the murder of David Baltzell, in the County of Gonzales, A. D. 1859. The facts disclosed by the record showed that the prisoner, in the evening, about three-quarters of an hour previous to the killing, had been playing billiards in a house adjoining the hotel, known as the Keyser House. About at sunset the party walked out on the pavement in front of the hotel, there being present about fifteen persons. In reply to a remark made by some one present, McCoy remarked, "That was the way my friend Dr. Brantley was killed here; that he had been here since yesterday evening, and intended remaining until the next evening; he had not been near that corner (pointing to Monroe's store) and did not intend to go there, for the reason that he did not want any of them to speak to him, and if they did, he would spit in their damned faces, and then they could murder him as they had his friend, Dr. Brantley." After

a pause, he remarked aloud, that "if they had any friends present, he wanted them to go and tell them not to come about him." It was also proved that McCoy, in his remarks on the street, had also said that "the Monroes were damned cowards and damned murderers, that he could whip any of them; that they and the Baltzells had murdered his friend; and that he would rather lie in Brantley's grave than to speak to them." And concluded by adding, "that he was there, and if Monroe had any friends, they could go and tell them what he said."

Shortly afterwards, William Baltzell came up with one Logan, who invited him and his brother, David Baltzell, to sup with him, which invitation was declined by the latter, and entered the hotel. Information was communicated to David Baltzell that probably there would be a difficulty at the hotel. When William Baltzell and Logan came up, one Brantley, who was sitting on a bench by the side of the door, got up and looked after Baltzell; and McCoy, who had been walking around, stepped to the door, when Brantley made a motion or sign towards Baltzell by nodding his head.

David Baltzell was seen to have a double-barrelled shot-gun about ten or fifteen minutes before the difficulty, and going toward the hotel. McCoy, Hardy, Gibson, Blakely and Brantley were in front of the

hotel. Hardy was seen with a six-shooter during the evening. When William Baltzell and Logan entered the hotel, Brantley asked one of the witnesses with whom he was conversing who it was with Baltzell; to which the witness replied that he did not know. Brantley then walked to where McCoy and Davis were, and either Brantley or Davis remarked, "That's him now," and looked in the door after them. McCoy and Brantley then went into the office, and opened the lid of a desk.

The witness started to go into the office, and was stopped by some one unknown to him, who said that Mr. McCoy was having a private conversation with a gentleman and that he could not go in.

William Baltzell and Logan proceeded to the supper room; the latter remarked he had supped once before. It was proved that the Baltzells had not been in the habit of going to the Keyser House since their affair with Dr. Brantley. Logan testified that when he insisted on Baltzell's going to supper, David said to William that he had better look out down there, as he might get into a difficulty, and gave him (the witness) some arms, for fear one might occur. William Baltzell testified that Logan (who was not sober) before starting to supper asked him for arms, and that he gave him a pistol, as did also his brother, David Baltzell. He stated that he himself was in the habit

of going armed at the time; that Logan was an old friend with whom he went to sup, without apprehending a difficulty, and was himself perfectly sober on the occasion. He also stated that he knew McCoy was in town, but did not know he had any particular place of staying; knew him when he saw him. That he had his pistol, all the barrels of which were loaded and capped. When they entered the supper room, no one was at the table except the landlord and his wife, and another gentleman. It is to be inferred from the facts that the guests or boarders had supped. William Laird, a witness for the defendant, stated that thinking there would be a difficulty, he spoke to McCoy and asked him to go with him and get a cigar, which offer was declined in a manner which was rather repulsive. The witness walked back, and met David Baltzell, who was standing by the last post of the portico, who asked him if he thought there would be a difficulty. Witness replied that he was fearful there would be, from what he had heard McCoy say in the evening, and told him what he had heard. To which he replied, that if the difficulty came up he would see it out. He then had in his hand a pistol, which was cocked.

Just then McCoy, who was standing at the door of the hotel, advanced a few steps in the hall. William Baltzell addressed him as "Mr. McCoy." At that

time David Baltzell ran to the door. McCoy, addressing himself to William Baltzell, said, "This is Mr. Baltzell, is it?" Was answered, "Yes." McCoy then said "Billy Baltzell?" and was answered as before. David had then got to the door. The witness, Laird, saw McCoy have his hand raised, holding in it, as he supposed, a pistol, in the attitude of striking, and William Baltzell was drawing his pistol. McCoy said, "Don't you speak to me, you damned murderer," and just then (as the witness thought) William Baltzell fired, and McCoy struck, and just about the same time David Baltzell fired at McCoy from behind, and was unseen by the latter. The witness was probably mistaken as to *the firing* of the pistol by William Baltzell. The cap exploded without firing, and none of the loads of his pistol were discharged.

William Baltzell was stunned by the blow, and on recovering from it sufficiently retreated through the dining room. A struggle ensued between McCoy and David Baltzell; the crowd escaped out of the room, and no eye witness testified further than that during the short struggle another pistol was fired, some one fell, McCoy walked out with what a witness supposed to be a pistol in his hand, and David Baltzell was found dead, shot in the forehead by a large ball. A derringer pistol was lying near him on the floor; a slung-shot or colt was also picked up. About the

wound were marks of powder burn. Hardy and Gibson went into the hall after the firing of the last pistol, and came out with McCoy, and they went off together. It was not shown where McCoy lived, what his business was there, who came with him, who were his associates, except as shown when the difficulty took place, nor that any one else took part in the fight besides the prisoner and the two Baltzells.

The district judge refused to allow bail to the prisoner, because it was the opinion of the court that the offense is not of a character that will, under the laws of Texas, admit of the privilege of bail.

Parker & Miller, for appellant.
Attorney-General, for the appellee.

ROBERTS, J.—Appellant was indicted in the District Court of Gonzales County, for the murder of David Baltzell; and having been brought before the district judge upon a writ of habeas corpus, and the evidence having been heard, it was decided that he was not entitled to bail; and from that decision an appeal was taken to this court.

The main question in the case is, whether or not the killing was upon express malice.

The amendment to the code established degrees in murder by the following provisions, to-wit:

"Article 608. All murder committed by poison,

starving, torture, or with express malice, or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery, or burglary, is murder in the first degree, and all murder not of the first degree is murder of the second degree."

"Article 612a. The punishment of murder in the first degree shall be death, and the punishment of murder in the second degree shall be confinement in the penitentiary for not less than five years." (O. & W. Dig., 534.)

By the 9th section of the Bill of Rights in the Constitution of the State of Texas, it is provided that "all prisoners shall be bailable by sufficient sureties unless for capital offences, when the proof is evident or presumption great." (O. & W. Dig., 14.)

The terms "proof is evident or presumption great" are as definite to the legal mind, as any words of explanation could make them; and are intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases, except in those in which the facts show, with reasonable certainty, that the prisoner is guilty of a capital offense.

The Code does not define what is meant by "express malice." But it is provided that "the principles of the common law shall be the rule of construction, when not in conflict with the Penal Code or Code of

Criminal Procedure, or with some other written statute of the State." (Art. 4, P. C., O. & W. Dig., 458.) Recourse must, therefore, be had to the common law authorities, for the meaning of the term "express malice."

In every indictment for murder, the prisoner is charged with having, with malice aforethought, killed the deceased. The proof to sustain this charge under the law may or may not exhibit deliberate malevolence in the mind of the prisoner towards the person killed, though that may be the literal import of the charge in the ordinary acceptation of the terms used. Hence, malice aforethought, when attempted to be defined, has been necessarily given a more comprehensive meaning than enmity or ill-will or revenge; and has been extended so as to include all those states of the mind under which the killing of a person takes place, without any cause which will, in law, justify, excuse, or extenuate the homicide. (Rex v. Harvey, 2 B. & C., 268; 1 Hawkins, 95; 1 Russell, 482; Penal Code, Art. 607.)

Hence, also, has originated the distinction between malice express and implied. The most complete and accurate view of the distinction between express and implied malice is to be found in Blackstone's Commentaries; which, it is believed, will be the better

understood and appreciated, in proportion to the research into other sources of information.

"Express malice is when one with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances, discovering that inward intention, as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm." (4 Blackstone's Com., 198.)

This description indicates, 1st, the state of mind at the time of the killing; 2d, the design formed; and 3d, the character of proof by which such formed design is to be discovered.

1. The person must be of sedate, deliberate mind. He must be sufficiently selfpossessed as to comprehend and contemplate the consequences of his acts. His acts must not be the result of a sudden, rash, inconsiderate impulse or passion. This, when there was an intention to kill, might still be murder, but not upon express malice. Hence, it is said, "If a man kills another suddenly without any or without a considerable provocation, the law implies malice." (4 Bl. Com., 200; Hale P. C., 455-6; 1 Russell, 483; Atkinson v. The State, 20 Texas R., 530-1; Mitchell v. The State, 5 Yerg., 340.)

2. The design formed must be to kill the deceased, or inflict some serious bodily harm upon him. This

would indicate that the malevolence must be directed towards the deceased as its object.

Mr. Hawkins says, that is most properly called express malice, when murder "is occasioned through an express purpose to do some personal injury to him who is slain in particular." (1 Hawk. P. C., 96.)

"Malice in fact (express) is a deliberate intention of doing some corporal harm to the person of another." (1 Hale P. C., 451.)

This design "is not confined to an intention to take away the life of the deceased, but includes an intent to do any unlawful act, which may probably end in depriving the party of life." (Roscoe, 707; 2 Starkie, 711.) This specific malevolence towards the person killed may be embraced in such utter and reckless disregard of life, as shows a man to be an enemy to all mankind; as when a man resolves to kill the next man he meets, and does kill him; or shoots into a crowd wantonly, not knowing whom he may kill. (4 Bl. Com., 200.) In such a case it may well be said, that he has malevolence toward the particular person killed, because he was one within the general scope of his malignity. The same may be said of one or more persons who enter upon the commission of another felony, in such way as to show a preconceived resolve to kill or do great bodily harm

to all or any one who may oppose the design. (4 Bl. Com., 200.)

If the formed design be not to kill the deceased, or inflict on him serious bodily injury, but to commit some other felony, the killing will not be on express malice. A attacking B with malice, shoots at him, but misses him and kills C, against whom he bore no malice, it is murder. This is not because of any malice in fact against C, but because of the evil design against B, which, it is said, is carried over against C by legal implication. (4 Bl. Com., 201.) How far this instance may be modified by the provision of our Code, it is unnecessary to consider. (Art., 49.)

So, if a person in attempting to commit robbery, arson, and the like, is violently resisted and kills the person resisting, he is guilty of murder, on implied malice, though he had no wish to kill the person who was slain; but merely to prevent himself from being injured. (1 Hale, 465.)

A case may be given under this head, illustrative of the one now under consideration in some of its features. "Several persons conspired to kill Dr. Ellis, and they set upon him accordingly; when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master; but knew nothing of his master's design. A ser-

vant of Dr. Ellis, who supported his master, was killed. The court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected; as malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis; but as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter, and three others of murder; and the three others were executed." (1 Russell, 510.) Hale, in his explanation of this case, says it is murder in those having malice against the master; "for the malice shall be carried over," so as to make the killing of the servant murder. (1 Hale P. C., 438.)

These instances will suffice to explain the principle announced, that the malice must be towards the particular person who is killed, to make it express.

3. The character of proof by which such formed design is to be discovered. Malice of all kinds must be inferred, because it consists in a quality or state of the mind, either actual or imputed. Its actual existence may be manifested by external circumstances, from which it may be reasonably inferred. In the absence of those external circumstances which make it manifest, it is in some cases imputed as a legal

inference, without reference to whether it exists in fact or not. Hence it is said by Mr. Starkie, "malice is either positive and express, or it is implied malice, or malice in construction of law. Malice of the former kind, consists in an actual and deliberate intention, unlawfully to take away the life of another, or do him great bodily harm, and the actual existence of such an intention, is a question of fact to be found and ascertained by the jury. Implied or constructive malice is not a fact for the jury, but is an inference or conclusion, founded upon particular facts and circumstances ascertained by them." (2 Starkie, 711.)

Upon these different modes of arriving at the conclusion that there is malice, arises another consideration in the distinction between express and implied malice. "Malice in fact (express) is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized. The evidence of such a malice, must arise from external circumstances, discovering that inward intention; as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various, according to variety of circumstances." (Hale P. C., 451.) These antecedent menacings, former grudges, deliberate compassings, and the like, are important, not as matters of aggravation in the quarrel or feud, so much as being facts from which the actual state of

the mind may be inferred at the time of killing, and the design which prompted the act. These external circumstances indicating the design, may transpire at the time of the killing, as well as before that time. For although the killing be upon a sudden difficulty, it may be attended with such circumstances of enormity, cruelty, deliberate malignity, cool calculating compassings, or even calm demeanor and absence of passion, as will be sufficient evidence to establish the inference that the killing was the result of a sedate deliberate mind, and formed design to take life, or do some great bodily harm. (Com. v. Jones, 1 Leigh Rep., 612.) Familiar cases given in illustration of this are, where a boy was tied to a horse's tail and dragged along and killed; where a master corrected his servant with an iron bar; where a school master stamped on his scholar's belly, etc. (4 Bl. Com., 199.) The antecedent circumstances, and those that are contemporaneous with the act of killing, may conspire to lend each other increased force in establishing this inference. (Hill v. The Commonwealth, 2 Grattan, Va., Rep., 603-4.) Acts and admissions, or other language of the prisoner, even after the mortal stroke or killing, may often be pertinent evidence, as tending to show express malice at the time of the killing. (The Com. v. Jones, 1 Leigh, Va., Rep., 670.)

In cases of sudden killing, in the absence of pre-

vious ill feeling, or where it is too slight to be presumed to be the motive for the act, there may often be found ample evidence of express malice in the means used, or manner of doing it. For a man is always presumed to intend that which is the necessary, or even probable consequence of his acts, unless the contrary appears.

However sudden the killing may be, if the means used or manner of doing it, or other external circumstances attending it, indicate a sedate mind and formed design to kill, or do great bodily injury, and a murder be committed, it will be upon express malice. (1 Hawkins, 96, Sec. 23.) In such case, if it appeared that the means used were likely to kill, or do great bodily harm, endangering life, and a killing took place, the natural inference would be that it was upon express malice; unless it was attended with such circumstances as showed an absence of such formed design, or as showed the act to be the result of an indeliberate, rash, sudden impulse or passion. (Whiteford v. The Commonwealth, 6 Randolph's Rep., Va., 723-4.)

The rule that from the isolated fact of killing, the malice is implied, and not express, however correct as an abstract proposition, can seldom be of practical utility, in ascertaining the species of malice. (2 Gratt., 594; Wright, Ohio, 20; Am. Law Homicide,

386; Pennsylvania v. Lewis et al., Addison's Rep., 282.) For that fact will rarely ever be presented in the entire absence of all antecedent or attending circumstances. Whether they be arrived at by positive or circumstantial evidence, they will constitute a legitimate basis for an inference as to the species of malice. The fact that no one witnessed the act of killing, will not necessarily make the rule applicable. In the case of Hill v. The Commonwealth (in Virginia), the evidence showed, that the prisoner had, some time prior to the fatal transaction, taken umbrage at the decedent. His pride had been wounded. He asked the deceased to walk with him, as he wished to say something to him. He took the deceased from the friends and company that surrounded him, into the shade of the night. He had with him a sword cane; and in the short space of between five and ten minutes, the deceased is seen returning from whence he started, and falls from a stab in the heart by an instrument, such as that in the possession of the prisoner; and the prisoner under cover of the night flies from his home and country. These facts alone were held sufficient to warrant the inference of express malice. (2 Grattan Rep., 603-4, 620.)

These views will perhaps sufficiently explain the character of proof by which the "formed design" is discovered.

The object of the proof is to establish the existence of the malice in fact, towards the deceased (as it has been explained), at the time of the killing, which prompted him to the commission of the deed. The sufficiency of the evidence to establish it is determined, as that of any other fact, by its effect to reasonably satisfy the mind.

There may be a case where there are facts tending to establish different conclusions as to the kind of malice; some to establish that the killing was upon express, and others that it was upon implied malice. In such case, the only rules as to the effect of the evidence, which it is now necessary to notice, are, 1st, That where "fresh provocation intervenes between the preconceived malice and the death, it will not be presumed that the killing was upon the antecedent malice." 2d. That though it will not be presumed, it may be proved to have actuated the person in the killing, by the circumstances and facts in the case, notwithstanding the fresh provocation. (2 Starkie, 712; The Commonwealth v. Jones, 1 Leigh's Rep., 612-13-14.)

It may be concluded, then, in determining whether a murder has been committed with express malice or not, the important questions are: Do the external facts and circumstances at the time of the killing, before or after that time, having connection with or relation

to it, furnish satisfactory evidence of the existence of a sedate deliberate mind, on the part of the person killing, at the time he does the act? Do they show a formed design to take the life of the person slain, or do him some serious bodily harm, which in its necessary or probable consequences may end in his death; or such general, reckless disregard of human life, as necessarily includes a formed design against the life of the person slain? If they do, the killing, if it amount to murder, will be upon express malice.

When the facts show, with reasonable certainty, that a murder, with express malice has been committed, bail should be refused.

We are of opinion, that the facts as presented in the record in this case, do not show with reasonable certainty, that the prisoner is guilty of murder with express malice, and that therefore he is entitled to bail.

Bail allowed.

UNITED STATES SUPREME COURT.

RAILROAD COMPANY v. STOUT.

1873.

17 Wall., 657.

Error to the Circuit Court for the District of Nebraska.

Henry Stout, a child six years of age and living

with his parents, sued, by his next friend, the Sioux City & Pacific Railroad Company, in the court below, to recover damages for an injury sustained upon a turntable belonging to the said company. The turntable was in an open space, about eighty rods from the company's depot, in a hamlet or settlement of one hundred to one hundred and fifty persons. Near the turntable was a traveled road passing through the railroad grounds, and another travelled road near by. On the railroad ground, which was not inclosed or visibly separated from the adjoining property, was situated the company's station-house, and about a quarter of a mile distant from this was the turntable on which the plaintiff was injured. There were but few houses in the neighborhood of the turntable, and the child's parents lived in another part of the town, and about three-fourths of a mile distant. The child, without the knowledge of his parents, set off with two other boys, the one nine and the other ten years of age, to go to the depot, with no definite purpose in view. When the boys arrived there, it was proposed by some of them to go to the turntable to play. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. Two of the boys began to turn it, and in attempting to get upon it, the foot of the child (he being at the time

upon the railroad track), was caught between the end of the rail on the turntable as it was revolving, and the end of the iron rail on the main track of the road, and was crushed.

One witness, then a servant of the company, testified that he had previously seen boys playing at the turntable, and had forbidden them from playing there. But the witness had no charge of the table, and did not communicate the fact of having seen boys playing there, to any of the officers or servants of the company having the table in charge.

One of the boys, who was with the child when injured, had previously played upon the turntable when the railroad men were working on the track, in sight, and not far distant.

It appeared from the testimony that the child had not, before the day on which he was now injured, played at the turntable, or had, indeed, ever been there.

The table was constructed on the railroad company's own land, and, the testimony tended to show, in the ordinary way. It was a skeleton turntable, that is to say, it was not planked between the rails, though it had one or two loose boards upon the ties. There was an iron latch fastened to it which turned on a hinge, and held the table in position while using. The catch of this latch was broken at the time of

the accident. The latch, which weighed eight or ten pounds, could be easily lifted out of the catch and thrown back on the table, and the table was allowed to be moved about. This latch was not locked, or in any way fastened down before it was broken, and all the testimony on that subject tended to show that it was not usual for railroad companies to lock or guard turntables, but that it was usual to have a latch with a catch, or a draw-bolt, to keep them in position when used.

The record stated that the counsel for defendant disclaimed resting their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rested their defense on the ground that the company was not negligent, and asserted that the injury to the plaintiff was accidental or brought upon himself.

On the question whether there was negligence on the part of the railway company in the management or condition of its turntable the judge charged the jury:

"That to maintain the action, it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if

in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence ''

The jury found a verdict of $7500 for the plaintiff, from the judgment upon which this writ of error was brought.

Mr. Isaac Cook, for the plaintiff in error, insisted:

1st. That the party injured was himself in fault, that his own negligence produced the result, and that upon well-settled principles, a party thus situated is not entitled to recover.

2d. That there was no negligence proved on the part of the defendant in the condition or management of the table.

3d. That the facts being undisputed, the question of negligence was one of law, to be passed upon by the court, and should not have been submitted to the jury.

Mr. S. A. Strickland, contra.

Mr. Justice Hunt delivered the opinion of the court.

1st. It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from faults, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.

But it is not necessary to pursue this subject. The record expressly states that "the counsel for the defendant disclaim resting their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defense on the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental or brought upon himself."

This disclaimer ought to dispose of the question of the plaintiff's negligence, whether made in a direct form, or indirectly under the allegation that the plaintiff was a trespasser upon the railroad premises, and therefore can not recover.

A reference to some of the authorities on the last suggestion may, however, be useful.

In the well known case of Lynch v. Nurdin, the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.

In Birge v. Gardner, the same judgment was given, and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser.

In Daly v. Norwich and Worcester Railroad Company, it is said the fact that the person was trespassing at the time is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.

In Bird v. Holbrook, the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser the defendant was held liable.

There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.

2d. Was there negligence on the part of the rail-

way company in the management or condition of its turntable?

The charge on this point (see supra, p. 659) was an impartial and intelligent one. Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States courts, to an order directing a verdict in its favor, the submission was right. If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment can not be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When

the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents.

So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been

one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided it if acting as jurors. The charge was in all respects sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it.

3d. It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the

existence of such facts comes in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a

matter of judgment and discretion, of sound inferences, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that the proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform

or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

In Redfield on the Law of Railways, it is said: "And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.

In Patterson v. Wallace, there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The judge at the trial withdrew the case from the jury, but it was held in the House of Lords to be a pure question of fact for the jury, and the judgment was reversed.

In Mangam v. Brooklyn Railroad, the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a non-suit, holding that these facts established negligence in those having the custody of the child. The Court of Appeals of the State of New York held that the case should

have been submitted to the jury, and set aside the non-suit.

In Detroit & W. R. R. Co. v. Van Steinberg, the cases are largely examined, and the rule laid down, that when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

It has been already shown that the facts proved justified the jury in finding that the defendant was guilty of negligence, and we are of opinion that it was properly left to the jury to determine that point.

Upon the whole case, the judgment must be affirmed.

THE SUPREME COURT OF TEXAS.

F. G. EVANSICH, JR., BY NEXT FRIEND v. THE G., C. & S. F. RY. CO.

Austin, 1882.

57 Texas, 123.

Appeal from Washington. Tried below before the Hon. I. B. McFarlane.

The opinion states the case.

F. G. Jodon, for appellant.

Hume & Shepard, for appellee.

STAYTON, Associate Justice.—This action was brought by appellant against the appellee to recover actual damages for expenses incurred by him for medical bills, medicines, nursing, and loss of time during the confinement of his infant son, alleged to have been caused by injuries received by the child while playing upon a turntable owned by the appellee, and situated in the city of Brenham, in a public place near a public street. The situation of the turntable in reference to plaintiff's residence; its public position; its dangerous structure; that children were accustomed to play on the turntable; that servants of appellee knew that fact; that it was unguarded, unenclosed, and in no way fastened; that without his consent or knowledge, and contrary to his orders, the child went to the turntable and was there seriously injured while playing thereon with other children (the nature and character of the injury being given); that in consequence of the injury received by the child he was compelled to employ a physician, purchase medicines, spend time in nursing the child, and incur other expenses and suffer other losses (the expense of all of which was stated), were alleged.

Demurrers were filed to the petition, which in substance set up that the petition was insufficient, because it appeared therefrom that the turntable was

upon the premises of the appellee; that the child was a trespasser, and that he was hurt by his own improper act. The demurrers were sustained and the cause dismissed.

The facts stated in the petition showed that the child was injured by the negligence of the appellee, under such circumstances as to render it liable for damages to the father and mother and also to the child. Railroad Company v. Stout, 17 Wall., 660; K. C. Ry. Co. v. Fitzsimmons, 22 Kans., 687; Koons v. St. Louis, etc., R. R., 65 Mo., 592; Keefe v. Milwaukee, etc., Railway Co., 21 Minn., 207.

The petition also negatived negligence upon the part of the plaintiff, and alleged want of discretion in the child, which was only seven years of age.

The plaintiff may maintain an action for the loss of the services of his child during minority, and for all necessary expenses and losses incurred in its attention while sick from an injury caused by the negligence of another, notwithstanding an action may be maintained in behalf of the child for such injury as gives personal damage to himself. Railroad v. Miller, 49 Texas, 322; Wood's Master and Servant, Sec. 227; 2 Thomp. on Neg., 1260.

For the error of the court in sustaining the demurrer to the petition, the judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

(Opinion delivered May 19, 1882.)

SUPREME COURT OF TEXAS.

MISSOURI, KANSAS & TEXAS RY. CO. OF TEXAS v. EDWARDS.

90 Texas, 65, 36 S. W. Rep., 430. 1896.

Error to the Court of Civil Appeals for the Fifth District, in an appeal from Grayson County District Court.

Foster & Wilkinson, for plaintiff in error.

E. J. Smyth and Wolfe & Hare, for defendant in error.

GAINES, Chief Justice.—Mollie Edwards, a minor suing by her next friend, brought this action against the Missouri, Kansas & Texas Railway Co. of Texas to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The negligence was alleged to consist in keeping a yard in which children were accustomed to play, and in piling a number of railroad bridge ties in such manner that they fell upon the plaintiff while playing upon them and injured her.

The facts disclosed by the testimony are as fol-

lows: The defendant company owned a lumber yard, which was used for the purpose of sorting bridge material and other like lumber. It was fenced, except upon one side along the company's railroad tracks. The plaintiff at the time of the accident was about eight years old, and lived with her mother just across an alley from the yard. Not being fenced along the track, the yard was easily accessible. It was shown that the plaintiff and other children were accustomed to resort there for the purpose of playing, but it was also shown that they were uniformly ordered out by the servants of the company. The parents of some of them were also warned to keep them away. It appeared, however, that, notwithstanding the persistent efforts of the servants of the company, the children would return. Just before the accident happened the plaintiff was sent home by the watchman and went out; but as soon as he was called away by other duties she returned. In attempting to climb upon the pile of bridge-ties one of them fell down and crushed her toes. There was evidence tending to show that the ties were insecurely stacked. The mother of the plaintiff testified, in effect, that she knew of the plaintiff's having visited the yard on former occasions and had punished her several times for it.

There was a verdict and judgment for the plain-

tiff in the trial court which judgment was affirmed in the Court of Civil Appeals. The case comes to this court upon a petition for a writ of error, which has been granted.

The errors assigned in the Court of Civil Appeals and which are insisted upon in this court are upon the charge and upon the refusal to give certain special instructions requested in behalf of the defendant. But in the view we take of the case, no critical examination of the charge is necessary. Two of the requested instructions were, in our opinion, statements of the law of the case as applied to the facts in evidence, and should have been given. They were as follows:

(1) "Defendant was under no obligation to keep watch over its premises, in order to exclude children therefrom. If the watchman of defendant discovered plaintiff, with others, playing in the yard, shortly before the accident, and requested them to leave, and plaintiff thereupon withdrew from the premises, but thereafter returned without the knowledge of defendant's watchman or person in charge of its property, for the purpose of playing in the yard, and while so doing was injured, without such watchman having knowledge of her being then present, and while playing there pulled down upon herself or caused to fall a tie or portion of a pile of ties, upon which she was

climbing, defendant would not be liable to plaintiff by reason of any injury so received."

(2) "Defendant was under no obligation to plaintiff to keep its lumber yard in safe or proper condition for plaintiff to play thereon. The yards were its property and it was entitled, as to plaintiff, to use them for piling lumber and to pile the same in such form as it found convenient, with due regard to the safety of such persons only as might properly use the yards. It was under no obligations to so pile or place its bridge ties as to prevent injury by a child climbing upon them, or to so pile, fasten or brace the same that the child could not, in trying to climb thereon, pull one or more of them down upon herself, nor can it be held negligent for failing to so pile, brace or secure them, if the injured person was at the time thereon without its knowledge or invitation."

Ordinarily the owner of property is not bound to keep it in such condition as to protect trespassers upon it from danger. Liability may be incurred by making an excavation upon one's own land sufficiently near a street or highway that another may in the exercise of reasonable care fall into it, or by exposing dangerous machinery or appliances in or near some public place, whereby one without fault on his part may be injured. Especially in the latter case may

liability be incurred when children are the victims. Until they have learned some discretion, they can not be held guilty of contributory negligence. Lynch v. Nurdin, 1 Q. B., 29, is a case of this class. There the "defendant negligently left a cart unattended; the plaintiff, a child of seven, got upon the cart in play; another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. It was held that plaintiff could recover." There are numerous American decisions which proceed upon the same principle. With reference to children there is still another class of cases which go a step further, and hold that the owner of land may not place upon it dangerous machinery, which is alluring to children, without securing it, so as to protect them against injury while tampering with it. To this class belong what have become commonly known in legal parlance as "the turn-table cases," such as Evansich v. Railway Co., in this court (57 Texas, 123), and Railway Co. v. Stout, in the Supreme Court of the United States (17 Wall., 657). This line of decision has not been uniformly followed, and has met with much adverse criticism, and it seems to us, that with respect to the care which the owner of the land is required to exercise, in order to secure from injury children who may trespass upon it, they go to the limit of the law.

They proceed upon the ground that turn-tables are attractive to children. In both of the cases cited stress was laid upon this fact, and also upon the fact that the use of the turn-tables by the children was known to the servants of the defendants. The ruling in these cases must be justified, we think, upon one of two grounds; either that the turn-tables possess such peculiar attractiveness as playthings for children that to leave them exposed should be equivalent to an invitation to use them or that when unsecured they are so obviously dangerous to children that when it is discovered that they are using them, it is negligence on the part of the owner not to take some steps to guard them against the danger.

But when it is said that it is enough that the object or place is attractive or alluring to children, and when it is said, as has been intimated, that the fact that they resort to a particular locality is evidence of its attractiveness, the question suggests itself, what object or place is not attractive to very young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place, conveniently accessible for their congregation, is free from the restless feet of adventurous truants? Here the language of an eminent judge in disposing of a similar case is ap-

propriate: "There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it, or fill up their ponds and level the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents." (Paxton, J., in Gillespie v. McGowan, 100 Pa. St., 100.)

We do not see that a yard kept by a railroad company for the deposit of old ties and other rejected material, or new material for railroad repair and construction, possesses any greater attraction for children

than any other place of deposit of any similar material kept by people pursuing other avocations. Is a pile of ties any more alluring than a pile of wood kept for fuel or a pile of rails laid aside for making or repairing a farm fence? Children may injure themselves in playing upon either. In such a case we conclude that the law does not devolve the duty upon the owner of the yard to see that the ties are so placed that children may not injure themselves while playing upon them. It has been so held in effect in many cases. See Vanderbeck v. Hendry, 34 N. J. L., 457; McAlpin v. Powell, 55 How. Pr., 163; Railway v. Cunningham, 26 S. W. Rep., 474; Railway v. Crum, 25 S. W. Rep., 1126. We refer especially to the able and elaborate opinion of Mr. Justice Sherwood in Barney v. Railway, 28 S. W. Rep., 1069, which contains a thorough discussion of the cases bearing on the question.

Applying the principles announced to the facts of this case, we are of opinion that the plaintiff was not entitled to recover. There was no peculiar allurement about the yard of the defendant company. Though the ties may have been inartistically piled, we do not see that any danger should have been anticipated from the manner in which they were stored. A witness swore that children seemed fond of playing about the lumber. If any one ever tam-

pered with the ties before, it does not appear from the testimony. The defendant could not, consistently with the use of its yard, fence it along its track. Children were persistently ordered out of the yard, and there is no ground for claiming an implied or constructive invitation to come upon the yard.

In any possible aspect of the case the charge which was given by the court was erroneous in authorizing the jury to find for the plaintiff, without reference to the question whether the servants of the company had exercised ordinary care to keep children out of its yard. If, in the opinion of the jury, such care had been exercised, then the verdict should have been for the defendant. But the court should have gone further and given the requested instructions which have been quoted above, and this is equivalent to saying, that it should have directed a verdict for the defendant.

The judgments of the District Court and of the Court of Civil Appeals are reversed and the cause remanded.

Reversed and remanded.

SUPREME COURT OF TEXAS.

DOBBINS v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

91 Texas, 60, 41 S. W. Rep., 62, 66 Am. St. Rep., 856.
1897.

Error to the Court of Civil Appeals for the Fifth District, in an appeal from Dallas County District Court.

Parks & Cerdin, for plaintiff in error.

Alexander, Clark & Hall, for defendant in error.

DENMAN, Associate Justice.—Prior to the construction of the roadbed of defendant in error there was, several hundred yards north of the point where Letot station is now situated, a depression from the east to the west which carried off storm water from the surrounding lands. Said roadbed having been constructed north and south across this depression without the necessary culverts and sluices to carry off such water, it was in its course westward diverted by the roadbed and compelled to run south in the excavation made on the right of way on the east side of the track in building the road. In its course it passed along by the section house, thence on by

the plank platform provided by the company for the reception and discharge of passengers and freight at said station, cutting a ditch several feet deep and forming within two or three feet of the platform a pool of water several feet deep. From this platform a path led to a store and postoffice across the ditch, which was crossed within ten feet of said pool of water on some plank placed there by the company, such pathway being generally used by persons going to and from the platform. There were several houses near the pool, one of which was the company's section house about 200 feet therefrom, in which plaintiff Dobbin lived. The ditch above described ran between this section house and the track, and there was another running on the other side of the house, the two ditches uniting before reaching the pool. Plaintiff's child, less than three years old, escaped alone from the section house, under circumstances warranting a finding by the jury that neither he nor his wife was guilty of negligence, and a short time thereafter was found drowned in the pool. From a judgment in favor of plaintiff for damages resulting from the death of the child the company appealed to the Court of Civil Appeals where the judgment of the trial court was reversed and the cause remanded on the ground that there was "no phase of the evidence which

justified a verdict for the plaintiff, and the court should have so instructed the jury."

Plaintiff has brought the cause to this court upon writ of error complaining of said holding of the Court of Civil Appeals and alleging in order to give jurisdiction to this court "that the judgment of the Court of Civil Appeals reversing the judgment of the District Court herein practically settles the case, and petitioner's attorneys here and now state that the decision of the Court of Civil Appeals practically settles the case, and petitioner further says that no proof other than that made on the trial of this cause in the District Court can be produced upon another trial and that no different evidence nor better evidence can be produced on another trial of this case, than was produced on the trial in the District Court."

In addition to the facts above stated there was evidence from which the jury could have found that the pool at its nearest point was not over two feet from the path, that there was a thickly-settled neighborhood around the station, that the pool was attractive and dangerous to little children of the age of deceased, that such children including deceased had before often played around same, that no precautions were taken by the company to prevent such children from getting into it, that the company was some time before the accident informed of such facts and

requested by plaintiff to remove the pool which was not done. There is no evidence in the record from which the jury could have concluded that the child was or had been traveling or attempting to travel said path at or just before it got into the pool. There is no evidence of any pass-way from the section house nor is there any evidence tending to show by what route the child reached the pool. There is no evidence that said path was used or intended to be used by any other than those going to and from the platform upon business in some way connected with the company.

The common law imposes no duty upon the owner to use care to keep his property in such condition that persons going thereon without his invitation may not be injured. In considering the question as to whether a duty exists there is no distinction between a case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former. If there be no duty the question of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby. Since the common law imposes no duty on the railroad to use care to keep its right of way in such condition that per-

sons going thereon without its invitation may not be injured and since there is no evidence in the record from which the jury could have found such an invitation to the child, it was no more liable in law for its death than would have been a neighbor had it wandered into his uninclosed lands and been drowned in his tank or creek or been killed by falling down his precipice. Since the principles above stated have been so fully and ably discussed heretofore by many learned jurists we deem it unnecessary to undertake to elaborate them but will content ourselves by referring to the opinion of the Court of Civil Appeals and the following cases decided upon similar facts: M., K. & T. Ry. Co. v. Edwards, 90 Texas, 65; Moran v. Pullman P. C. (Mo.), 36 S. W. Rep., 659; Richards v. Connell, 63 N. W. Rep., 915; Galveston Oil Co. v. Morton, 70 Texas, 400; City of Indianapolis v. Emmelman, 108 Ind., 530.

We are aware that there are cases asserting a contrary doctrine, but do not think they are based upon sound principle. They rest mainly upon Railway v. Stout, 17 Wall., 657, and cases following same known as the "Turn-table Cases." In the Stout case there were three questions to be determined, (1) did the law impose upon the company a duty to use care to keep its property in such condition that persons going thereon without its invitation would not be in-

jured? (2) was the child six years old guilty of contributory negligance, and (3) was the company guilty of negligence in leaving the turn-table unlocked? The first and most important question, without an affirmative answer to which the third could not arise, was not even referred to, and, if we may judge from the opinion, that learned court's attention was not called to its presence in the case; the second was admitted by the railroad in favor of plaintiff; and the third, if the first were determined in the affirmative, was clearly a disputed question of fact which the court correctly held was settled by the verdict. The main force of the opinion is spent upon this third question in attempting to show that the evidence was of such a character that the jury were justified in finding that the company had not used such care in guarding the turntable as a reasonably prudent person would have done under similar circumstances. There could have been no doubt upon this question. The opinion of the court would have been much more satisfactory if it had undertaken to establish instead of assuming the affirmative of the first question. If a child go uninvited upon a neighbor's property and be drowned in his tank, creek or river, or fall off his fence, woodpile, haystack or precipice, or is injured while playing with his canemill or cornsheller, and the courts assume the affirmative of the first question

above stated, as was done in the Stout case, the jury would in most cases be warranted in finding that the neighbor had not used reasonable care to so guard his tank, etc., or lock his canemill or cornsheller as to avoid such injury. Under this new doctrine the question as to whether the tank, etc., or the canemill, etc., was attractive and dangerous to the child would be for the jury, and they could as truthfully say it was as they could of the turntable; for our common experience as well as the reported cases demonstrate that a great many more children lose their lives by such means than upon turntables. This logical extension or rather application of the doctrine of the Stout case has recently found expression in the case of City of Pekin v. McMahon, 154 Ill., 141, where a verdict and judgment holding the owner of a lot in the city, upon which there was a pool of water, liable for the death of a boy who went there uninvited and was drowned, was upheld, the court, after assuming the existence of the duty as was done in the Stout case, saying: "The question, whether a defendant has or has not been guilty of negligence in case of such an accident upon his land to a child of tender years, is for the jury. Involved in this question is the further question whether or not the premises were sufficiently attractive to entice children into danger, and to suggest to the defendant the probability of the

occurrence of such an accident; and, therefore, such further question is also a matter to be determined by the jury. (Mackey v. City of Vicksburg, supra; R. R. Co. v. Stout, supra.) The subject of the attractiveness of the premises was submitted to the jury by the instructions given for the plaintiff in the case at bar." See also Stendal v. Boyd (Miss., 1897), Am. Neg. Rep., Vol. 1, p. 94, affirming such a judgment without discussion, on authority of the "Turntable Cases." Bransom's Adm'r v. Labrot, 81 Ky., 638; Brinkley Car Works, etc. v. Cooper, 31 S. W. Rep., 154. The difficulty about these cases is that they either impose upon owners of property a duty not before imposed by law or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In these cases the courts, yielding to hardships of individual instances where owners have been guilty of moral though not legal wrongs in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law and assumed legislative functions in imposing a duty where none existed. As a police measure the law-making power may and doubtless could, without unduly interfering with or burdening private ownership of land, compel the inclosure of

pools, etc., situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal or civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed the courts may properly enforce it or allow damages for its breach, but not before.

We do not wish to be understood as holding that one is not liable for injuries to persons going onto his land uninvited when such injuries are intentionally inflicted, e. g., where a pit is sunk or a gun is set on one's land to injure trespassers. In such cases the liability is based upon the breach of the duty imposed by law not to intentionally injure even a trespasser—and such intent may be evidenced by circumstances, as where one secretly digs a pit across a pathway over his land where he has reason to believe another will pass at night. In such cases the liability is not based upon the assumption that the owner owes a duty to the uninvited person to keep his premises reasonably safe, but upon the fact that he owes a duty to such person not to intentionally injure him. The failure to observe this distinction has led to much confusion.

But plaintiff in error contends that Art. 4436, R. S., which reads as follows: "In no case shall any railroad company construct a roadbed without first

constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof," imposed upon the company the duty of preventing the accumulation of water on its right of way. The object of this statute was to prevent the railroad from unnecessarily interfering with the natural drainage of the land on either side of its right of way. The words "for the necessary drainage thereof" express the purpose of the statute, and "thereof" refers to "land." It was not intended to compel the railroad to so leave and maintain the excavations made from time to time on its right of way in such condition as to prevent the accumulation of water therein. While such a requirement might be just in some places, it would be so very burdensome when applied to all portions of the road, as this statute was evidently intended, that courts should not construe it as imposing the duty contended for by plaintiff in error in the absence of language plainly expressing such intention on the part of the law-making power. We do not regard Rosenthal v. Railway, 79 Texas, 325, as in conflict with the construction here given to the statute. There the water was backed up onto the adjoining land and was allowed to remain until it became stagnant and offensive. The condition of the water was a nuisance interfering with Rosenthal in the enjoyment of his property, and the

company would have been liable at common law for that reason if the water had been confined to its right of way. The fact that the company so constructed its roadbed as to violate the statute by backing the water over the adjoining land aggravated and increased the nuisance, for even pure water thus backed upon his lots became a nuisance.

The case before us is not within the rule of law imposing upon the owner the duty not to permit any dangerous excavation to remain on his own land so near a street or highway as to injure persons who while attempting to follow same may by mishap fall therein, because (1) there is no evidence tending to show that the child was at the time of the accident traveling or attempting to travel the path, and such duty is not imposed as to persons who approach the excavation by any other route, and (2) the path not being a public road but merely for the use of persons going to and from the platform on business connected in some way with the company, the invitation to use it would probably not apply to the child in this case and therefore the law did not impose the duty above mentioned on the railroad as to it—such duty being imposed only as to persons thus invited to use the path.

Being of opinion that the Court of Civil Appeals did not err in reversing and remanding the cause on

the ground above stated, it becomes our duty under the statute to here enter judgment that plaintiff in error take nothing by his suit, which is accordingly done.

THE SUPREME COURT OF TEXAS.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY v. NANNIE MORGAN.

June 6, 1898.

92 Texas, 98.

Error to the Court of Civil Appeals for the First District, in an appeal from Nueces County.

R. W. Stayton, for plaintiff in error.

G. R. Scott & Bro., for defendant in error.

DENMAN, Associate Justice.—This was a suit brought by Nannie Morgan, a widow, to recover damages for injuries inflicted upon Koss Morgan, her child, 10 years of age. Omitting the usual formal allegations, the petition alleged:

"That on or about the 16th day of June, 1895, the defendant had and maintained near its main railroad track in the town of Alice, a place of about 2500 inhabitants, in the county of Nueces, a large revolving platform, commonly known as and called a turntable, and it was intended and used by the defendant

for the purpose of turning its railroad cars, locomotives, etc., in a different direction.

"The said turntable was supported by and revolved on a pivot under the center thereof and iron wheels or trucks which were placed under each of the two ends thereof, and which, when the turntable revolved, moved along a circular track around said pivot. It was massive and heavy and composed of iron and wood material, principally of iron, and was not constructed, as is usual, in a circular pit dug in the ground, but the defendant had negligently erected and constructed the same on the natural unbroken surface of the ground at the end of its side or switch track, so that all the parts thereof, its substructure, beams, and revolving appliances, were exposed to the view of persons passing by, and thereby rendered it more noticeable and conspicuous than it would have been had it been constructed in the customary manner aforesaid. It was so arranged and placed in regard to its proximity to the end of the said sidetrack that it could be placed in such a position that the ends of the track thereon came up close to those of the sidetrack, and when placed in this position, it virtually formed a prolongation of the sidetrack, so that a locomotive or car could be rolled onto the same from the sidetrack and turned in a different direction while it was standing thereon. Around said

turntable was constructed a platform or scaffold, circular in shape, and intended and used for a footway for the person revolving the turntable by means of a large wooden beam or lever attacked to each of the two ends thereof, and which projected therefrom over the footway and moved around with the turntable as it revolved. The said turntable was located in an open public place in the town of Alice and in close proximity to residences, and it was not in any manner fenced or inclosed so as to obstruct the way of anyone who might choose to go thereon, and it was at all times accessible to children and the public generally who frequented the locality in which it was situated. It was a dangerous machine, and when not locked or fastened the slightest force was sufficient to put it in motion and cause it to revolve rapidly, and on account of its character, construction, and appearance, but principally on account of the fact that they could easily revolve the same when it was not fastened or locked, the said turntable was calculated to attract and did attract the attention of children of tender years who would be enticed thereto for amusement and pleasure; and such children, ignorant of the nature and construction of said turntable, as well as of the method of operating the same so as not to incur personal injury, would as a pastime, when the turntable was left unfastened

and unguarded, cause it to revolve and ride thereon, and in other ways make it the means of childish sport and diversion, not knowing the danger and hazard to which they thereby exposed themselves. That the defendant, through its proper officers, agents, and servants, was fully aware of the dangerous character of said machine, and well knew of the peril and danger to which the children who lived in Alice would be exposed by leaving the same unguarded and unfastened, and on and about said date of June 16, 1895, and prior thereto, it had in force a rule and regulation for the government and guidance of its officers, agents, and servants who had in charge the care and control of said turntable, which required them to keep the same securely fastened and locked so that it could not be revolved or moved around, and such rule was well known to said officers, agents, and servants. That plaintiff is the widow of Morgan, now deceased, and of the children born to her in lawful wedlock by her said husband, is an only son, Koss Morgan, now a minor of tender years, who up to the present time has been and is now being cared for and reared by plaintiff herein. That on or about said date of June 16, the defendant carelessly and negligently left said turntable unguarded and unfastened, so that the same could easily be put in motion, and while it was so unguarded and unfastened

the said Koss Morgan, then 10 years old, together with a companion, Ashby Dixon, of about the same age as himself, without the knowledge of plaintiff, and without negligence on her part, entered thereon in quest of sport and pleasure, and to amuse themselves by revolving said turntable and riding thereon, and in other ways to gratify their fancies and desires by playing with the same. At the time they were each and both ignorant of the dangerous character and nature of the turntable and of the method of operating and revolving the same without injury to themselves, and neither of them thought or knew, or had reason to believe or have sufficient discretion to appreciate, that they exposed themselves to any danger or risk in attempting to revolve said turntable and riding thereon. On arriving at the turntable, Ashby Dixon caught hold of the lever attached to one end thereof and began to push the turntable around, and while it was in motion the said Koss, ignorant of the danger of his so doing, and without sufficient discretion to appreciate such danger, and bent only on childish sport, stepped from the end of the sidetrack aforesaid onto the end of the turntable, and was in a recumbent position on the turntable, with toes pointing downwards, when his right foot was caught between the end of one of the rails of the track on the turntable and the end of the rails

of the sidetrack, and as the turntable revolved it so badly mashed and lacerated said foot that the bones had to be taken therefrom to effect a cure." Then follows allegations of circumstances showing the damage to plaintiff on account of such injuries inflicted upon her son, which she alleges amount to $5550, for which she prays judgment as actual damages.

To this petition a general demurrer having been urged in the court below by defendant railway and overruled, and judgment having been rendered for plaintiff, the company appealed to the Court of Civil Appeals, assigning as error the action of the court in overruling such demurrer, which assignment of error having been overruled by the Court of Civil Appeals, the company has brought the case to this court upon writ of error, complaining that said courts erred in refusing to sustain such demurrer.

"In order to state a cause of action against the defendant in a case like this, the facts alleged in the petition must show (1) a duty owed by defendant to the party injured; (2) a failure on part of defendant to exercise the degree of care required of it by law in the performance of that duty. It takes both to constitute negligence. The sole assault made here upon the petition under the demurrer is that it does not show such a duty to have existed. If it does not, the second question, as to whether the com-

pany used the degree of care the law would require of it in the performance of such a duty, can not be reached. Dobbins v. Railway, 91 Texas, 60. We will therefore confine our examination to the question as to whether the petition shows such duty.

The law imposes upon the carrier certain duties toward his passenger, upon an employer certain duties toward his employee, and upon a person traveling a public street or highway certain duties toward others thereon, for the reason that these various relations of persons to each other are lawful. Hence when facts are alleged showing the particular relation, the duty follows as a matter of law.

When, however, one enters upon the private property of another, his relation to that property and the owner thereof is not prima facie lawful, and therefore the law does not, merely by reason of his presence thereon, impose upon the owner any duty of care for his protection, although his wrongful presence does not relieve the owner of the general duty imposed upon him by law as a member of society not to intentionally injure another. In such a case, to state a cause of action against the owner for damages for an injury inflicted upon him while thereon, the petition need only show a violation of such general duty, or in other words an intentional injury. Such intent can be established either by direct evidence

or by circumstances showing such a reckless disregard of the lives and safety of others as to estop the owner from denying the intent. As illustrating if not fully supporting this principle, see Hydraulic Works Co. v. Orr, 83 Pa. St., 332, as explained in Gillespie v. McGowan, 100 Pa. St., 144; Penso v. McCormick, 9 L. R. A., 313.

If, however, the person entering upon the private property of another does so by invitation of the owner, a lawful relation is thereby established and the law imposes upon the owner a duty of care for his safety, the degree of which we need not consider here. Such invitation may be express or implied. Where it is claimed to have been express it is a mere question of fact as to whether it is sought to establish the fact of invitation from circumstances, the greatest difficulty arises in determining the character of circumstances from which the fact of invitation can be inferred. This is especially true where, as in the case before us, the invitation is sought to be established by estoppel, against what was in all probability the true intent of the owner.

It has been contended broadly that when an owner places or permits anything upon his property which is attractive to others and one is thereby induced to go thereon, the invitation may be inferred as a fact by the court or jury. Now, since it is manifest

that to some classes of persons, such as infants, the things ordinarily in existence and use throughout the country, such as rivers, creeks, ponds, wagons, axes, plows, woodpiles, haystacks, etc., are both attractive and dangerous, it is clear that the adoption of such a broad contention would be contrary to reason, lead to vexatious and oppressive litigation, and impose upon owners such a burden of vigilance and care as to materially impair the value of property and seriously cripple the business interests of the country. Therefore it has been generally held that the invitation can not be inferred in such cases. These cases rest upon the sound principle that where the owner makes such use of his property as others ordinarily do throughout the country there is not, in legal contemplation, any evidence from which a court or jury may find that he had invited the party injured thereon, though it be conceded that his property or something thereon was calculated to and did attract him. Railway v. Edwards, 90 Texas, 65; Dobbins v. Railway, 91 Texas, 60, and cases cited therein; Peters v. Bowman, 115 Cal., 345; Joske v. Irvine, 44 S. W. Rep., 1059, 91 Texas, 574.

Where, however, the owner maintains upon his premises something which on account of its nature and surroundings is especially and unusually calculated to attract and does attract another, the court

or jury may infer that he so intended and hence invited him. Where one exhibits on his own land, near where children are likely to be, pictures or unusually attractive machinery, etc., he can expect no other result than that it will appeal to the known instincts of a child of immature judgment and cause him to venture thereon, just as the dog was drawn into the baited trap by the scent of meat. Townsend v. Wathen, 9 East., 277.

Thus we see (1) that a general duty is imposed upon an owner as a member of society not to intentionally injure any one, and (2) that, if he invites one on his premises, an additional duty is imposed to use care to avoid his being injured; and that while the first duty exists in all cases, and its violation may be shown by direct evidence or by circumstances, the second as well as its violation may be shown by direct evidence or by circumstances. Therefore if the party injured shows in his petition either that his injury was intentional, as above indicated, or that he was invited and subsequently injured by reason of the failure of the owner to use the care required of him by law, he states a cause of action.

In so far as the turntable case and other cases involving injuries upon dangerous machinery or private property may be considered to lay down the broad proposition that the owner can be held liable

without proof of either an intent to injure or an invitation, as these have been above explained, we do not think them based upon sound principle.

We do not think the petition in this case shows an invitation, in that it neither alleges such fact, nor that the turntable was unusually attractive; nor does it allege that there was any intent to injure within the meaning of the principles above discussed. We think the fact of invitation or the fact of an intent to injure, as the case may be, are issuable ones, to be found, and probably should be alleged specifically, or at least such facts should be stated as to make it clear that such issue or issues are presented to be passed upon. The case of 9 East., supra, and Corby v. Hill, 4 C. B. (N. S.), 556, seem to recognize that these issues must be presented by the pleadings, and we think this is peculiarly the case under our system, which requires a statement of the facts constituting the cause of action or defense. Cotton Oil Co. v. Jarrard, 91 Texas, 289, 42 S. W. Rep., 959.

For error in failing to sustain the general demurrer, the judgment will be reversed and the cause remanded.

APPENDIX.

A Partial Legal Bibliography.

It would be at once tedious, expensive and unprofitable to attempt to set out, in this appendix, anything approximating a complete Legal Bibliography. No such effort will be made.

A partial list of the United States Statutes and Court Reports will be given and after this a few blank pages will be inserted so that each teacher may have the students in his class to extend the list of books so as to include those which are particularly useful and important in his particular jurisdiction.

United States Statutes—Official Publications.

At the close of each session of Congress, the Acts and Resolutions passed during the session are published in temporary form. After the second or short session of each Congress, the Acts and Resolutions of that and of the preceding session are published in one volume, designated as the "United States Statutes at Large," passed by the ——— Congress, giving the number of the Congress.

In process of time these statutes at large become very numerous and of course much of the past legislation contained in earlier volumes becomes obsolete, either by change of conditions to which they applied or by repeal, direct or indirect.

In recognition of these facts Congress, from time to time, has provided for compiling and publishing in one volume all the statutes of a general nature which are in force when the compilation is made.

The first of these compilations was made and published in 1875 and was designated "Revised Statutes of the United States."

A second compilation was made and published as the "Revised Statutes of 1878."

In 1901 another compilation was made of all the general statutes enacted from the organization of the Government and in effect March 4, 1901. This was published in three volumes and is called the "Compiled Statutes of the United States of 1901."

Since 1901 the statutes have been published in form of supplements to the compiled statutes of that date.

Unofficial Publications.

There have been several publications of the United States Statutes made by private persons in different forms and with different degrees of completeness.

Reports of the Decisions of the Courts of the United States.

The Supreme Court of the United States is at once the oldest and most important court in the Federal judicial system. From its organization to the present time its opinions have ranked high as court decisions and have also been among the most powerful influences in shaping and giving definite character to our government and institutions.

For many years the volumes containing the reports of its decisions were designated by the name of the official reporter who prepared and edited the respective volumes.

The names and numbers of these earlier reports are as follows:

Dallas Reports, 4 volumes.
Cranch's Reports, 9 volumes.
Wheaton's Reports, 12 volumes.
Peter's Reports, 16 volumes.
Howard's Reports, 24 volumes.
Black's Reports, 2 volumes.
Wallace's Reports, 23 volumes.

The last volume of Wallace contains the decisions

of the court to its adjournment in June, 1874. Since that time the volumes have not been officially designated by the name of the reporter, but as United States Reports. As the total number of volumes known by the names of the respective reporters is ninety, the next volume is known as United States Reports, No. 91, and each subsequent volume has had its appropriate consecutive number. Occasionally the earlier volumes which are usually cited by name of the Reporter are now cited by number in the series beginning to count from first Dallas down. In this method 5 United States Report is equivalent to 1 Cranch Report, and so through the whole number.

There are several other editions of the earlier reports, but these have almost fallen into disuse.

There are two current series of these reports published by private parties. The first of these is known as the Lawyers Edition and is published by the Lawyers Co-operative Co. This edition begins with the earliest report, 1 Dallas, and is continued throughout the entire series up to the last volume issued. In this several volumes as contained in the official reports are condensed into one. This greatly reduces the number of books and also reduces the cost. The latest publication of this Lawyers Edition is quite fully annotated.

The Lawyers Edition keeps practically up with the work of the court by means of pamphlets known as "Advanced Sheets."

In 1883 the West Publishing Company began the publication of "The Supreme Court Reporter," which it continues to publish, issuing one volume each year. It also keeps up with the court decisions by means of "Advanced Sheets." This set connects with the official reports at Volume 106.

Soon after the Government was organized, Circuit and District Courts were established. These, especial-

ly the Circuit Courts, had very important and extensive jurisdiction and many matters coming before them secured very great consideration and the judges deciding them often wrote opinions in connection with their decisions. Many of these were very valuable. From time to time a great many of these were published. Many of them were put in series of reports, some were in newspapers or law periodicals. There was no entirely complete publication of all these decisions until 1880, when the West Publishing Company began the Federal Reporter, which gave full reports of all current cases in which written opinions were filed in the Circuit and District Courts.

Sometime later the West Publishing Company collected all decisions of all the Circuit and District Courts from their organization up to the beginning of the Federal Reporter, and published them in 31 large volumes, called "The Federal Cases."

In 1891, Congress created another class of Federal Courts, known as Circuit Courts of Appeals. There are nine of these courts. Their jurisdiction is exclusively appellate and extends to a large number of the cases tried in Circuit and District Courts. Practically all decisions in these courts are accompanied by written opinions. All these opinions, since the organization of the courts, have been published in the Federal Reporter mentioned above.

The Lawyers Co-operative Company also publishes all the decisions of Circuit Courts of Appeals. This series is known as the "Circuit Court of Appeals Reports." This series is still being kept up.

Another series of reports known as the "United States Appeals Reports" was begun and continued for some time, but is now discontinued.

The foregoing series of reports contain all the Federal case law.

There are many Digests, one or more having been prepared for each of the series of reports. These

Digests are extremely useful. Indeed, one or more of them is indispensable to the effective use of any one of the series of reports.

These decisions are also digested and included in the Century Digest, and can be found from that.

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